In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1364

CENTRAL ARKANSAS AUCTION SALE, INC.; MAJOR LEWIS, D/B/A MAJOR LEWIS LIVESTOCK AUCTION SALES; BILL RICE AND LOIS RICE, D/B/A CLEBURNE COUNTY LIVESTOCK AUCTION SALE; AND TRAVIS McGEE, D/B/A ATKINS LIVESTOCK AUCTION,

Petitioners,

vs.

THE U. S. DEPARTMENT OF AGRICULTURE AND THE PACKERS AND STOCKYARDS—AMS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CENTRAL ARKANSAS AUCTION SALE, INC.; MAJOR LEWIS, D/B/A MAJOR LEWIS LIVESTOCK AUCTION SALES; BILL RICE AND LOIS RICE, D/B/A CLEBURNE COUNTY LIVESTOCK AUCTION SALE; AND TRAVIS McGEE, D/B/A ATKINS LIVESTOCK AUCTION,

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Reference Note:

As of January 1, 1978, pursuant to an internal reorganization of the U. S. Department of Agriculture, the Packers and Stockyards Administration became a subdivision of the Agricultural Marketing Service branch of the Department of Agriculture. Hence, Petitioners refer to the Packers and Stockyards—AMS, instead of the Packers and Stockyards Administration.

Petitioners will additionally refer to the Packers and Stockyards—AMS as "Agency."

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, pertaining to this cause, is not reported as of this writing. It is submitted, in slip opinion form, in Appendix "A".

The opinion of the Judicial Officer of the U. S. Department of Agriculture, pertaining to this cause, is reported at 36 A.D. 764 (1977). It is submitted in Appendix "B".

The opinion of the Administrative Law Judge of the U. S. Department of Agriculture, pertaining to this cause, was not reported. It is submitted, too, in Appendix "C".

JURISDICTION

Dates of Decision and Judgment:

The decision and judgment of the U. S. Court of Appeals for the Eighth Circuit was issued February 10, 1978.

The Petitioner did not seek a rehearing of its cause in the Court of Appeals.

Statutory Basis:

This cause originated as an administrative law proceeding initiated by an agency of the United States Government. It reached the Eighth Circuit for the U. S. Court of Appeals by virtue of the jurisdiction conferred in 28 U.S.C. 2342 (2). The Supreme Court has jurisdiction to review a decision of the U. S. Court of Appeals by granting Writ of Certiorari, 28 U.S.C. 1254 (1), 2350; and Rule 19 (1), Revised Rules of the Supreme Court of the United States of America.

Statement:

In addition, Petitioner points out that essentially the same question raised in this Petition is being brought to this Court's attention in a Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit in a cause styled:

GILES LOWERY STOCKYARDS, INC. D/B/A
LUFKIN LIVESTOCK EXCHANGE,
Petitioners,

vs.

THE U. S. DEPARTMENT OF AGRICULTURE
AND
THE PACKERS AND STOCKYARDS—AMS,
Respondents,

from a decision issued December 27, 1977, *Giles Lowery Stockyards, Inc.* v. *Department of Agriculture*, 565 F.2d 321 (C.A.—5th 1977).

QUESTIONS PRESENTED

1. CAN THE AGENCY SEEK IN 1976 TO "STAMP WITH APPROVAL", THROUGH AD HOC LITIGATION, A METHODOLOGY, ITS RATE ANALYSIS, WHICH IT HAD FORMULATED, ADOPTED, AND APPLIED SINCE AT LEAST 1970, BUT WHICH IT HAD NEVER ANNOUNCED TO THOSE TO WHOM IT APPLIED ITS RATE ANALYSIS?
2. IS THE DECISION AND ORDER OF THE JUDICIAL OFFICER DEFECTIVE FOR ITS LACK OF REFERENCE TO ASCERTAINABLE STANDARDS?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are:

The Packers and Stockyards Act, 1921, 7 U.S.C. 181 *et seq.* and related regulations found at 9 CFR Chapter 2, and more specifically

7 U.S.C. 201

7 U.S.C. 202

7 U.S.C. 206

7 U.S.C. 207

9 CFR 203.8

The Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and more specifically

5 U.S.C. 552 (before amended on November 21, 1974, with an effective date ninety days thereafter)

5 U.S.C. 553

The specific statutes are identified and submitted as Appendix "D".

STATEMENT OF THE CASE

This case arises under 7 U.S.C. 181, *et seq.*, Packers and Stockyards Act of 1921, hereinafter referred to as the Act. Petitioners were at all times material to this cause engaged in conducting livestock marketing businesses as registrants under the Act, which involved being registered with the Secretary of Agriculture as a market agency, 7 U.S.C. 201, 202, Appendix "D" pages A237-A238.

The present appeal began with the filing of a complaint, order of suspension and notice of hearing (hereinafter referred to as complaint), on January 30, 1976, for each respective petitioner. The complaints: Central Arkansas Auction Sale, Inc., P&S Docket No. 524; Major Lewis, d/b/a Major Lewis Livestock Auction Sales, P&S Docket No. 5250; Bill Rice and Lois Rice, d/b/a Cleburne County Livestock Auction Sale, P&S Docket No. 5251; Travis McGee, d/b/a Atkins Livestock Auction, P&S Docket No. 5252; were filed by the Administrator, Packers and Stockyards Administration (now Packers and Stockyards—AMS) (hereinafter referred to as the Agency), United States Department of Agriculture (hereinafter referred to as the Department), as agent and designate of the Secretary of Agriculture. The basis for the complaints is found in Section 207 (e) of the Act, Appendix "D" pages A239-A240.

The complaints were issued by the Agency because: On January 14, 15, and 16, 1976, appellants filed with the Agency new tariffs, which were to go into effect on February 1, 1976, and which would have assessed greater rates and charges for stockyard services than their respective tariffs then on file and in effect. The Agency concluded that a further rate increase would be unreasonable and the aforementioned complaints were issued.

The Agency suspended the utilization of the respective tariffs sought by appellant for thirty days and then again for a second thirty days, per Section 207 of the Act, for a total suspension of sixty (60) days. Thereafter, the respective tariffs of each Petitioner became effective.

An oral hearing was conducted before Administrative Law Judge Victor W. Palmer in April of 1976. Mr. George F. Hartje, Jr., Esquire, Conway, Arkansas, represented the appellants (the hearing was a consolidation of the respec-

tive complaint for each appellant), and Mr. Eric Paul, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D. C., represented the Agency. The purpose of the hearing was to determine whether the schedule of rates and charges as set forth in appellants' respective tariffs was "just, reasonable, and nondiscriminatory" per Section 206 of the Act, Appendix "D" page A238.

Judge Palmer filed an Initial Decision and Order on November 16, 1976, proposing rates higher than recommended by the Agency but different from those set forth in the challenged tariffs.

Both sides took an appeal to the Judicial Officer. Final administrative authority to decide rate cases under the Packers and Stockyards Act has been delegated to the Judicial Officer, 7 U.S.C. 450c-450g.

The Decision and Order of the Judicial Officer was filed May 6, 1977.

The sequence of events can be summarized as:

1. Each respective Petitioner sought a tariff increase; e.g. Agency acceptance of a new tariff: Central Arkansas Auction Sale, Inc., sought a Tariff No. 2; Major Lewis, d/b/a Major Lewis Livestock Auction Sales sought a Tariff No. 3; Bill Rice and Lois Rice, d/b/a Cleburne County Livestock Auction Sale sought a Tariff No. 3; Travis McGee, d/b/a Atkins Livestock Auction sought a Tariff No. 2.

2. The Agency applied its rate analysis to the data on each Petitioner's most recent annual report, Appendix "B" page A14.

3. The Agency issued its complaint against each Petitioner.

4. The Agency calculated a reasonable revenue requirement for each Petitioner's business for a base period by an application of its rate analysis to each Petitioner's annual report.

5. The proposed tariff of each Petitioner is declared "unjust and unreasonable".

6. The Agency prescribed a tariff for each Petitioner's business, Appendix "B" pages A129-A137.[1]

Reference Note:

A tariff is a schedule of rates and charges which a marketing business subject to the Packers and Stockyards Act, 1921, can assess a consignor who sells his livestock through the marketing business.

A percentage tariff, or a value-based tariff, is one in which the charges to the consignor are based on the amount or value for which the consignor's livestock was sold.

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1. 7 U.S.C. 211 states: Whenever after full hearing upon a complaint made as provided in Section 309, or after full hearing under an order for investigation and hearing made by the Secretary of his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be just, reasonable and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed.

A per-head tariff is one in which the charges to the consignor are based on a flat-charge per head of livestock sold. Appendix "B" pages A129, A137 are examples.

The Agency's rate analysis or rate methodology can be found briefly outlined in Appendix "B" pages A21-A28.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Certiorari should be granted for a thorough consideration of the questions presented for three significant reasons:

1. The questions were not adequately considered in the forums below.

2. The consideration given these questions below was not in accord with existing precedents and statutory requirements.

3. The questions presented deal with important aspects of administrative law.

Introduction

Further perspective with regard to the questions presented is gained from:

1. The first question could be framed as: WHETHER THE AGENCY WAS REQUIRED, THROUGH PROPER NOTIFICATION AND PUBLICATION PROCEDURES, TO AFFORD THE PETITIONER THE OPPORTUNITY TO CONFORM TO AND OPERATE ITS BUSINESS IN LIGHT OF THE METHODOLOGY AND STANDARDS BY WHICH THE AGENCY VIEWED AND APPRAISED PETITIONER'S BUSINESS OPERATIONS FOR RATE REGULATION PURPOSES?

2. The Decision and Order begins, Appendix "B" page A14:

> "On January 13, 14, and 15, 1976, the four respondents filed with complainant proposed increases in their rates and charges which were to go into effect on February 1, 1976. The proposed schedules of rates and charges would have increased the percentage charges then in effect from 3% of the first $2,000 of gross sales proceeds obtained for a consignor plus 2% on any sum above $2,000 (except the Rices charged a straight 3%), to 4% of the first $2,000 plus 3% on any sum above $2,000.
>
> "Respondents furnished no information in support of the increases when they filed the proposed schedules. Thereafter, complainant concluded on the basis of the proposed tariffs and respondents' annual reports[2] that the proposed rates would be unjust, unreasonable and/or discriminatory . . ."

The Agency had no regulations or published guidelines relating to data or information which a registrant, such as Petitioner, is required to submit in conjunction with a request for a tariff increase.

3. The Agency's rate analysis or rate methodology had not been published or announced to those whom the

---

2. (footnote not in Decision and Order) 9 CFR 201.97 states: "Every packer, stockyard owner, market agency, dealer (except a packer buyer registered to purchase livestock for slaughter only), and licensee shall file annually with the Administration a report on prescribed forms not later than April 15 following the calendar year end or, if the records are kept on a fiscal year basis, not later than 90 days after the close of his fiscal year. The Administration on good cause shown, or on his own motion, may grant a reasonable extension of the filing date or may waive the filing of such reports in particular cases (33 F.R. 14400, Sept. 25, 1968)."

Agency regulated prior to the filing of the complaint against the Petitioner on January 30, 1976.

4. The Agency's rate analysis or rate methodology had not been published or announced to those whom the Agency regulated prior to the oral hearing for this cause in April, 1976.

5. The Agency did provide counsel for Petitioner at the oral hearing notice of its methodology for analyzing auction rates prior to the oral hearing, Appendix "A" page A4, by providing counsel with a copy of the Judicial Officer's Decision and Order in the *Giles Lowery* case, *supra.*

6. The Agency's long-standing, but unpublished and unannounced policy was to apply its rate analysis to the data of a registrant's latest annual report; see Appendix "B" pages A14, A37, A45, A54, A60.

7. The Agency has published policy statements, which recognize:

(a) that Petitioner is not a public utility,

(b) that Petitioner is not a monopoly (9 CFR 203.8 (h), Appendix "D" page A244),

(c) that Petitioner is in competition with other businesses in the livestock marketing industry (9 CFR 203.8 (d), Appendix "D" page A242),

(d) that the Agency does not favor one marketing system over another (9 CFR 203.8 (k), Appendix "D" pages A246-A247).

I

The Agency has contended throughout that:

> ". . . the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency . . .", *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947).

See Appendix "A" page A3. And, the thrust of the examination of the "Notice Issue" by the Court of Appeals was directed toward whether counsel for the Petitioner in the oral hearing below was given sufficient notice of the Agency's rate analysis to prepare a case, Appendix "A" pages A3-A5, see *Hill* v. *Federal Power Commission*, 335 F.2d 355 (C.A.—5th 1964), *Port Terminal Railroad Association* v. *United States*, 551 F.2d 1336 (C.A.—5th 1977).

II

Both the Agency and the Court of Appeals have misplaced the import of Question 1 in the order of things. Question 1 is a threshold issue which precedes the question of notice to Petitioner's counsel prior to the administrative oral hearing.

The Agency's rate analysis or ratemaking formula or the methodology which it utilizes for its rate regulation function was formulated and adopted and applied, in whole and in part, several years before the Agency issued its complaint initiating this cause.

There is nothing in the Decision and Order, Appendix "B", which points to, or hints that, the Agency's rate analysis was a "proposition" or a "proposal". Nor, has it ever been asserted that the Agency's rate analysis, or any

aspect of it, was a product of the adjudicatory process of the administrative oral hearing for this cause.

A fair reading of *SEC* v. *Chenery Corp., supra,* to place the referenced material in context, will show the unavailability of that leading decision for an affirmative answer to Question 1. That decision speaks of "problems which arise in a case which the administrative agency could not reasonably foresee . . .", "Or the Agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized in nature as to be impossible of capture within the boundaries of a general rule.", at 332 U.S. 194, 202, 203, 67 S.Ct. 1575, 1580. The language of that decision in context with the situation which that agency faced simply does not mean that this Agency can utilize "ad hoc litigation" to "stamp approval" on substantive policy which it had been applying to those whom it regulated, but which it had never formally announced.

III

Additional support for Petitioner's contentions with respect to Question 1 follows:

1. The Decision and Order of the Judicial Officer quite clearly shows that the Agency's methodology was formulated and adopted and applied by the Agency as far back as at least 1970:

(a) Bad Debt Allowance—Appendix "B" pages A108-A110:

> "For many years, the Complainant removed all bad debt expenses and made no allowance for bad debt losses. *However, in 1968 or 1969,* the complainant began making an allowance based on the stockyard

> industry's average bad debt experience (Tr. 169)." (Emphasis added)

(b) Allowance for Use of Land—Appendix "B" page A119:

> "We recommended to the administrator, the Packers and Stockyards Administration, that we adopt a method of allowing a use for land of six cents per unit. *We adopted that in approximately (in) 1969,* as I recall, and since that date all land values of stockyards is based on six cents per unit." (Emphasis added)

(c) Rate of Return on Buildings and Equipment—Appendix "B" pages A114-A118: See Errata.

> "This is the only allowance under complainant's auction market rate analysis which is based on a rate return times value. *Prior to about 1969,* the allowance for land was computed by multiplying the rate of return times the value of the land, but the allowance for land is now computed on the basis of the number of animal units handled at the market, which, in this case, resulted in an allowance more than three times larger than would have been determined under the *pre-1969 formula.*" (Emphasis added)

(d) Animal Units and the Formula for Determining Owner's Compensation—Appendix "B" pages A101-A102.

> "The concept of animal unit was devised because the costs associated with the sale of different species varies according to the species; but revenue analysis requires consistent treatment of all livestock sold at a market. The conversion formula *adopted by complainant* was supported by a statistical analysis by Mr. Everett Stoddard, an Agricultural Economist for complainant."

(Tr. 274-275; see also, Comp. EX. IX, pp. 9-11, attached to stipulation 3, filed August 9, 1974) (Emphasis added)

"The complainant's present formula for computing a working owner's allowance *was adopted in 1970*, and is reviewed yearly. Mr. Jack W. Brinckmeyer, Chief of complainant's Rate Branch, testified that the formula still provides more than adequate compensation for a market's working owner." (Tr. 207-209) (Emphasis added)

See the Decision and Order Appendix "B" pages A26-A28 for the significance of the animal unit concept as it enters into a number of calculated "allowances" in the Agency's rate analysis.

It has to be clear and inescapable from this immediate discussion that the Agency's "rate analysis" was internally a fully formulated and adopted and utilized methodology from at least 1970 onward. But, it was never published or announced to those against whom it was applied, including the Petitioner.

2. The Agency utilized this methodology in initiating the following rate hearings, based on the language of 7 U.S.C. 207 (e), Appendix "D" pages A239, A240, which are a matter of public record:

(a) March 29, 1974, P&S Docket No. 4933, In re Corona Livestock Auction, Inc.;

(b) July 8, 1975, P&S Docket No. 5151, In re C. E. Mills and E. E. Mills, d/b/a Mills Auction Market;

(c) July 18, 1975, P&S Docket No. 5157, In re Robertsdale Livestock Auction, Inc.

(d) August 8, 1975, P&S Docket No. 5164, In re Granite City Livestock Sales.

Each of these rate hearings was initiated by the Agency prior to the initial decision of the administrative law judge from the oral hearing of the *Giles Lowery* case, *supra*, e.g. prior to the "ratemaking formula achieving the status of a 'substantive rule of general applicability' or a 'statement of general policy' " if we are to believe the Fifth Circuit.

Can there be any doubt that the Agency is applying a methodology already formulated and adopted internally?

3. In addition to the erroneous consideration of the rate analysis vis-a-vis 5 U.S.C. 552, the Court of Appeals failed to address the Agency's rate analysis or rate methodology in terms of its substantial impact and general applicability, not only to the Petitioner, but to others in the industry similarly situated, and the provisions of 5 U.S.C. 553, Appendix "D" pages A248-A250, *National Motor Freight Traffic Ass'n* v. *United States*, 268 F.Supp. 90 (D.C. D.C. 1967), affirmed 393 U.S. 18, 89 S.Ct. 49, 21 L.Ed.2d 19 (1968), *Pharmaceutical Manufacturers Ass'n* v. *Finch*, 307 F.Supp. 858 (D.C. D.Dela. 1970). Certainly, there can be no doubt that the regulation of revenues which a business can receive has a substantial impact on its private rights and obligations. Elementary fairness should require that reasonable opportunity be given for submission of views by those materially affected, *Brokers-Dealers Trade Ass'n* v. *SEC*, 442 F.2d 132, 144 (C.A.—D.C. 1971), cert. den. 404 U.S. 828, 92 S.Ct. 63, 30 L.Ed.2d 57 (1971).

4. Additional support for a thorough consideration of Petitioner's first question is found by noticing:

(a) That in 1958 Congress amended the Packers and Stockyards Act to include Petitioner, among some 2,000 other businesses such as Petitioner's, as subject to the Act, Appendix "B" pages A80-A84.

(b) That the Agency, in the oral hearing below, was seeking a declaration that all value based tariffs were illegal, Appendix "B" pages A127-A128, e.g. contra to the language "just, reasonable, and nondiscriminatory" of 7 U.S.C. 206, Appendix "D" page A238. This aspect becomes highlighted when the Agency again turned to "ad hoc litigation" with respect to the rate hearing for these Petitioners, all of whom had percentage (value-based) tariffs. The Agency also pursued a value-based tariff in the *Giles Lowery* case, *supra,* and this aspect was noted in the Petition For Writ Of Certiorari To The Fifth Circuit now before this Court and referenced *supra.*

(c) That at the time of the oral hearing below, some 1,200 businesses, such as Petitioner's, as registrants under and subject to the Packers and Stockyards Act, 1921, utilized some form of a value-based tariff and such tariffs had been utilized within the industry without challenge from the Agency for some 15 years.

Hence, there is a close and direct analogy to *N.L.R.B.* v. *Majestic Weaving Co.,* 355 F.2d 854 (C.A.—2nd 1966).

IV

Petitioner points to a lack of ascertainable standards as a fatal defect in the Decision and Order of the Judicial Officer, *Question 2.* A brief analysis will show the defects.

First, the Agency must find a way to declare the respective tariffs of each Petitioner "unjust and unreasonable", 7 U.S.C. 211, footnote 1, *supra.* Then, secondly, the Agency can prescribe its own tariff.

The manner of getting to an "unjust and unreasonable" tariff is to first apply the rate analysis to calculate a reasonable revenue requirement for a base period.

The revenues of the marketing business are compared to the reasonable revenue requirement. If the revenues do, or are projected to, exceed the reasonable revenue requirement, the tariff generating such revenues is deemed "unjust and unreasonable", and the Agency goes on to prescribe a tariff. This happened in the *Giles Lowery* case, and in the instances of three of these Petitioners,—Central Arkansas Auction Sale, Inc.; Major Lewis, d/b/a Major Lewis Livestock Auction Sales; and Travis McGee, d/b/a Atkins Livestock Auction, Appendix "B" pages A43, A44; A52, A53; A58, A59. Yet in each such instance here, as well as the *Giles Lowery* case, *supra,* the Agency can turn around and prescribe a tariff which also goes over the reasonable revenue requirement. Of what merit is the rate analysis if it can be exceeded? Where is the standard that tells us the relative importance of the rate analysis vis-a-vis the possible methods by which a business could receive revenues in excess of the reasonable revenue requirement and still be deemed to have a tariff which was "just and reasonable"? There are no such standards. This is emphasized in the instance of Petitioners Bill and Lois Rice, d/b/a Cleburne County Livestock Auction Sale, which had projected revenues less than the reasonable revenue requirement, Appendix "B" pages A67, A68. Here, the Agency had "painted itself into a corner". So, the Agency shifted gears to place emphasis on the method of reaching the reasonable revenue requirement. But, again, with no reference to standards.

The shadow over all of this cause, and argument, is that none of the Petitioners ever had a chance to operate his business with a knowledge of the Agency's rate analysis.

The Agency has the requirement to formulate and apply its rate analysis and then to be the judge of how the application of its rate analysis is to be interpreted, which it has done without prior notice of any ascertainable standards to those affected. Petitioners do not believe that such Agency action can stand in harmony with the provision of the Administrative Procedure Act, as well as our elementary concepts of due process and fairness. Without notice of either the substantive policy or its interpretation, the Petitioners have been subject to "secret law".

Two sharp discrepancies are: In this cause the Agency applied its rate analysis essentially to just the Petitioners' annual reports for a base period. In the *Giles Lowery* case, *supra,* the Agency applied its rate analysis to audited data of that business. But why the difference? The point with respect to revenues less than the reasonable revenue requirement has just been made.

CONCLUSION

From the above discussion it is quite evident that the questions presented did not receive adequate consideration in the forums below. And, the questions presented deal with important aspects of administrative law with serious implications to those subject to this Agency's regulation, as well as agency regulation in general. While it may at this time be academic, we cannot address this cause in a straightforward manner without posing at least to himself, the thought: "Just maybe, if each Petitioner had been permitted to conduct his business in light of the Agency's views on rate regulation, the complaints and oral hearing below would not have been necessary."

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 77-1364

CENTRAL ARKANSAS AUCTION SALE, INC., ET AL.,

PETITIONERS,

VERSUS

THE U.S. DEPARTMENT OF AGRICULTURE AND THE PACKERS AND STOCKYARDS - AMS,

RESPONDENTS.

ERRATA TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Upon re-reading Petitioners' brief after it had been filed, the following error was found:

The quoted material found at III-1-(c) of Petitioners' brief, p. 13, and referenced to Appendix "B" pages A114-A118 is not specifically found at those pages. The quoted material is from the Judicial Officer's Giles Lowery decision Appendix "B" in No. 77-1366 now before this Court on petition for a writ of certiorari to the U.S. Court of Appeals - Fifth Circuit and presented as a companion case to this cause. The quoted material is not reproduced verbatim in the Judicial Officer's Central Arkansas decision, Appendix "B" here, but rather finds its way to this Appendix "B" by way of the Judicial Officer's references

to his prior Giles Lowery decision. Counsel for Petitioners would not mean to mislead the Court, and hence, brings this to its attention.

Respectfully submitted,

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ATTORNEY FOR PETITIONERS

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1452

Central Arkansas Auction Sale, Inc.; Major Lewis, d/b/a Major Lewis Livestock Auction Sales; Bill Rice and Lois Rice, d/b/a Cleburne County Livestock Auction Sale; and Travis McGee, d/b/a Atkins Livestock Auction,
Appellants,

v.

Bob Bergland, Secretary of Agriculture, and the United States of America,
Appellee.

Appeal from an order of the Secretary of Agriculture

Submitted: December 14, 1977
Filed: February 10, 1978

Before ROSS, STEPHENSON and WEBSTER, Circuit Judges.

STEPHENSON, Circuit Judge.

This is an appeal from an order of the Secretary of Agriculture establishing commission charges for selling livestock at four auction markets operated by the petitioners in Arkansas. This case arose when petitioners (appellants) filed with the Packers and Stockyards Administration (Administration), an agency of the United States Department of Agriculture (Department), proposed increases

in their rates and charges which were to go into effect on February 1, 1976. Petitioners furnished no information in support of the increases when they filed their proposed schedules. The Administration concluded on the basis of the petitioners' annual reports that the proposed rate increases would not be "just, reasonable, and nondiscriminatory" as required by 7 U.S.C. § 206.[1] The Administration filed a separate complaint, order of suspension, and notice of hearing for each petitioner on January 30, 1976, and suspended the operation of the proposed increased rates for 60 days. The hearings were consolidated and held in April 1976 at Little Rock, Arkansas, before an administrative law judge. The decision of the administrative law judge was filed on November 19, 1976, proposing rates higher than recommended by the Administration but different than the petitioners' proposals. Both sides appealed to the Secretary of Agriculture, who referred the matter to the Department of Agriculture's judicial officer, who had been delegated final administrative authority to decide rate cases. The judicial officer, under the authority of 7 U.S.C. § 211,[2] denied petitioners' requested rates and instead prescribed the rates to be charged by the auction markets. *In re Central Arkansas Auction Sale, Inc.*, 36 Agric. Dec. 764 (1977). In this appeal the auction markets raise several issues, including lack of notice and the use of a confiscatory rate making scheme by the Department.

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1. 7 U.S.C. § 206 provides:

> All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

2. 7 U.S.C. § 211 provides that whenever, after full hearing, the Secretary of Agriculture determines that any rate or charge is or will be unjust, unreasonable, or discriminatory, the Secretary may determine and prescribe what will be the just and reasonable rate or charge.

For the reasons stated below, we affirm.

Notice

Petitioners and the Livestock Marketing Association, *amicus curiae*, argue initially that the rate making scheme used by the Administration in the rate making hearing should first have been proposed and adopted in a rule making context. Petitioners contend that they proceeded to the hearing before the administrative law judge under the assumption that the Administration would use the traditional rate of return method for calculating rates. The Administration, however, without notice to the petitioners, used a new method of computation. This, according to the petitioners, violated the dictates of *Hill* v. *FPC*, 335 F.2d 355 (5th Cir. 1964), and denied them due process.

We are not persuaded by petitioners' argument. The Supreme Court has stated that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). *See City of Chicago* v. *FPC*, 458 F.2d 731, 742 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972); *Alabama-Tennessee Natural Gas Co.* v. *FPC*, 359 F.2d 318, 343 (5th Cir.), *cert. denied*, 385 U.S. 847 (1966). Furthermore, an agency is not precluded from announcing new principles in an adjudicative proceeding. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969). The crucial inquiry in our opinion is whether petitioners had sufficient notice of the method of computation to be used in the hearing so that they could prepare a case. *Giles Lowery Stockyards, Inc.* v. *Dep't of Agriculture*, 565 F.2d 321, 326 (5th Cir. 1977). *See Port Terminal R.R. Ass'n* v. *United States*, 551 F.2d 1336, 1342-43 (5th Cir. 1977).

Turning to the record before us, we note that at the beginning of the rate making hearing on April 1, 1976, counsel for the petitioners notified the administrative law judge that approximately 60 days prior to the hearing he was furnished with a set of proposed tariffs. Only two days prior to the hearing petitioners' counsel was given another set of proposed tariffs which are now at issue. Furthermore, on the day the hearing began petitioners' counsel was provided a copy of *Giles Lowery Stockyards,* 35 Agric. Dec. 267 (1976), which apparently first enunciated the method of computation used by the Administration in the instant case. In light of these developments counsel for the petitioners, with no objection by the government, asked that a continuance be granted following the government's evidence and before presentation of the petitioners' case. This procedure was accepted and a three-week continuance was granted. Although the government was unable to present all its witnesses in the first two days of the hearing and consequently called several additional witnesses at the start of the reconvened hearing, the petitioners voiced no objection. Furthermore, the petitioners did not seek a second continuance following the government's case but rather chose to put on their evidence.

Under these circumstances, the petitioners' reliance on *Hill* v. *FPC, supra,* is misplaced. In that case the standards applied by the agency were not announced until the decision, which simultaneously held that the proof was insufficient to make out the prima facie case under them. In the instant case the rate making standards that were ultimately adopted by the Secretary of Agriculture were provided to the petitioners before the three-week continuance and the presentation of their evidence. Furthermore, these standards were fully aired during the hearing and were amenable to rebuttal evidence. Therefore,

we conclude that the instant case is clearly distinguishable from the *Hill* case.

The better practice in this case would have been to inform petitioners well in advance of the hearing the method to be used by the Administration in analyzing the auction rates. *See Giles Lowery Stockyards, Inc.* v. *Dep't of Agriculture, supra,* 565 F.2d at 325-26. Under the circumstances, however, with the three-week continuance following the furnishing to petitioners' counsel of the *Giles* case, 35 Agric. Dec. 267 (1976), we are persuaded that petitioners had adequate notice so that they could prepare a case.[3]

Rate Making Method

Petitioners attack the rate making method used by the Department of Agriculture on several different grounds. First, the petitioners argue that the unit allowance concept relied upon by the Department is defective and will result in erroneous conclusions as to revenue needed by the petitioners. More specifically, the petitioners contend that rather than the unit allowance concept, which takes nationwide averages regarding some categories of expenses and allocates a certain amount to each animal sold, the Department should have utilized a rate base and rate of return formula.

Contrary to petitioners' argument, however, a rate making agency is not required to use a single regulatory

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3. Petitioners further contend that the Department of Agriculture was required to publish its rate making method under the Freedom of Information Act, 5 U.S.C. § 552. Assuming arguendo that publication was required here, actual knowledge or notice of agency policy precludes reliance on the agency's failure to comply with the publication requirement of the Freedom of Information Act. *Giles Lowery Stockyards, Inc.* v. *Dep't of Agriculture, supra,* 565 F.2d at 326; *Whelan* v. *Brinegar,* 538 F.2d 924, 927 (2d Cir. 1976).

formula. *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-77 (1968); *Wisconsin* v. *FPC*, 373 U.S. 294, 309 (1963); *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). Furthermore, when "devising a ratemaking scheme, a regulatory agency can take into account the peculiar characteristics of a particular industry and can choose among various competing theories." *Giles Lowery Stockyards, Inc.* v. *Dep't of Agriculture, supra*, 565 F.2d at 324; *Alabama-Tennessee Natural Gas Co.* v. *FPC, supra*, 359 F.2d at 335. Finally, an agency in its discretion may use average costs or allowances[4] rather that (than) the actual cost figure supplied by the utility. *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 387-88 (1974); *Permian Basin Area Rate Cases, supra*, 390 U.S. at 818-19; *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 440-42 (1930); *Giles Lowery Stockyards, Inc.* v. *Dep't of Agriculture, supra*, 565 F.2d at 327. We refuse the petitioners' invitation to compel the Department to utilize a rate base and rate of return formula.

Secondly, the petitioners argue that the Department must use the rate of return formula for auction markets because this particular formula is used for terminal stockyards. *See generally Denver Union Stock Yard Co.* v. *United States*, 304 U.S. 470 (1937). This argument, however, ignores the distinct difference between the two operations. For example, the owners of large terminal stockyards provide the facilities where livestock are bought and sold and invest millions of dollars in the stockyards. Auction markets are usually small operations with investments generally less than $50,000. The terminal stockyard owners' income depends on the return allowed on their investment in the stockyard. On the other hand, the great majority of auction market owners actively work at their auction markets and a large part of their income is derived from the Department's computed allowance for a working owner. The Department can clearly take into account these differences in determining a rate formula. *Giles Lowery Stockyards, Inc.* v. *Dep't of Agriculture, supra*, 565 F.2d at 325; *Alabama-Tennessee Natural Gas Co.* v. *FPC, supra*, 359 F.2d at 335.

4. In the instant case the Department accepted without challenge approximately 60% of the expenses claimed by the petitioners. A per animal allowance using nationwide averages was utilized for the following expenses: (1) labor and management performed by owners/officers, (2) return on working capital, (3) bad debts, and (4) business-getting and maintaining expenses.

Thirdly, the petitioners contend that the rate making scheme employed by the Department is confiscatory and unreasonable. In this regard, it has long been recognized that the "power to regulate is not a power to destroy." *Railroad Commission Cases*, 116 U.S. 307, 331 (1886). A reasonable rate is one that is not confiscatory in the constitutional sense. *FPC* v. *Natural Gas Pipeline Co., supra*, 315 U.S. At 585. On the other hand, "The Secretary is not required to prescribe rates so low as to be barely sufficient to withstand attack on the ground of confiscation, but is at liberty within limits that he may find to be just and reasonable to establish higher rates." *Denver Union Stock Yard Co.* v. *United States, supra*, 304 U.S. at 483. *See Banton* v. *Belt Line Ry.*, 268 U.S. 413, 422-23 (1925). Additionally, as the Fifth Circuit recently stated, "[A] regulated industry is not entitled, as a matter of right, to realize a particular rate of return, and the interests of the consuming public are also to be considered in establishing rates." *Giles Lowery Stockyards, Inc.* v. *Dep't of Agriculture, supra*, 565 F.2d at 324. *See Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U.S. 578, 596 (1896); *FPC* v. *Natural Gas Pipeline Co., supra*, 315 U.S. At 606-07 (Black, J., concurring).

Turning to the instant case, the Secretary of Agriculture, under the authority of 7 U.S.C. § 211, may determine and prescribe a just and reasonable rate. Under this type of statutory standard, judicial inquiry is at an end if the total effect of the rate prescribed by the Secretary cannot be said to be unjust and unreasonable. *FPC* v. *Hope Natural Gas Co., supra,* 320 U.S. 591, 602 (1944). "Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." *Id. Accord, FPC* v. *Texaco, Inc., supra,* 417 U.S. at 387-88; *Wisconsin* v. *FPC, supra,* 373 U.S. at 309. Moreover, "he who would upset the rate order * * * carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." *FPC* v. *Hope Natural Gas Co., supra,* 320 U.S. at 602. *Accord, American Toll Bridge Co.* v. *Railroad Commission of Calif.,* 307 U.S. 486, 494-95 (1939).

Following the petitioners' application for increased rates, the Administration began its rate analysis for each auction market. Each stockyard's cost of operation was examined for the base year 1974, which at the time was the most recent year for which the statistics were available. Any expenses which the Administration determined were not properly chargeable to the stockyard were subtracted from the market's claimed expenses. Additionally, four categories of expenses were subtracted by the Administration and replaced by allowances based on nationwide averages. *See* note 4. Finally, additional allowances were made for the auction market's return on buildings, equipment and land and for an operating margin. The total of these figures equaled the auction market's total reasonable revenue requirement.

Following the determination of each market's reasonable revenue requirements for 1974, the receipts which would have been produced under petitioners' proposed increased tariffs were determined. A comparison of these totals led the Administration to conclude that the proposed tariffs were not just, reasonable and nondiscriminatory. Furthermore, a comparison of the market's actual receipts in 1974 led the Administration to conclude that petitioners' existing tariffs were not just, reasonable and nondiscriminatory.

Based on the above findings, the Administration constructed a new per-head weight tariff, as opposed to the petitioners' existing value-based tariff, in an attempt to prescribe a just and reasonable rate. The Department's judicial officer, in reviewing the Administration's rate scheme, concluded that the rate scheme was reasonable and hence not confiscatory. This conclusion was based in part on his comparison of the auction market's revenue requirements for 1974 and the receipts which would be expected in 1976 under the Administration's rates. The judicial officer's justification for using cost figures of one year and revenue figures of another was stated as follows:

> No challenge is made by respondents [auction markets] as to the use of the calendar year 1974 as the base period * * *.
>
> * * * [The Administration] constructed a tariff to produce reasonable rates based on complainant's [Administration's] estimate of the volume to be received by each respondent in calendar year 1976. Here, again, complainant was using the most recent data then available. It is practical and easy to use the most recent volume data, and it is necessary and appropriate to use the most recent volume data because ratemaking looks to the future.

In re Central Arkansas Auction Sale, Inc., supra, 36 Agric. Dec. at 824.

Before oral argument, each party was asked to provide this court with their estimate of the revenue which would have been received in 1974 under the tariffs proposed by the Administration. When these figures are compared with the total reasonable revenue requirements of 1974, the estimated revenues fall short of the requirements. However, the government in submitting these figures stated that the estimated receipts were predicated on extrapolations from the petitioners' unaudited data. Furthermore, the government indicated that the unaudited figures were sufficiently imprecise to preclude exact projections. In light of these drawbacks, we do not place great weight on the 1974 projected revenue figures.

In our opinion a problem still exists, however, in comparing revenue requirements in 1974 to expected receipts in 1976. We note that the judicial officer has recognized the potential problem in the following manner:

> It is only in the case of litigation that there is a serious time lag between the most recent cost data and the most recent volume data; and this time lag creates no actual problem because during the interval between the filing of the final Decision and Order and the effective date thereof, respondents can easily file applications for increased rates based on more recent data, and the applications will be acted upon by complainant [the Administration] before the effective date of the Order.

In re Central Arkansas Auction Sale, Inc., supra, 36 Agric. Dec. at 824.

It is our view petitioners have failed to show with clear and convincing proof that the rates are unreasonably

low. In light of the serious time lag between the cost data and the volume data, however, we do not discourage petitioners from filing applications with the Administration for increased rates based on more recent data.[5]

Finally, petitioners attack the Administration's refusal to consider several of the petitioners' reported expense items in determining the reasonable revenue requirements for the auction markets. However, it is not controlling that the method employed to determine the rate contained infirmities with respect to one or more items as long as the total effect of the rate order cannot be said to be unjust and unreasonable. *FPC* v. *Hope Natural Gas Co., supra,* 320 U.S. at 602; *Alabama-Tennessee Natural Gas Co.* v. *FPC, supra,* 359 F.2d at 331. Our conclusion that the total effect of the Secretary's rate order cannot be said to be unjust and unreasonable ends further judicial inquiry into the rate making method.

Judicial Officer Bias

Finally, petitioners argue that they were denied due process by the submission of this appeal to a judicial officer whose background was that of an Administration rate maker. In our opinion, however, the fact that the judicial officer has had experience with the regulatory process is not alone a sufficient basis for disqualifying him from his present function in the agency. Moreover, a preconception about the impropriety of a certain method of calculating rates is not grounds for disqualification. Agency officials are assumed to be capable of judging a particular controversy fairly on the basis of its own circumstances. The petitioners have not made a showing to the contrary. *See Withrow* v. *Larkin,* 421 U.S. 35, 55 (1975).

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5. The Secretary's order has not yet become effective because of the stay granted by this court pending its review.

Conclusion

In summary, we have thoroughly explored the record and carefully examined the Secretary's conclusions. We are convinced that the Secretary's findings are supported by the evidence and proper legal standards have been applied. *See Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 413-16 (1971); *Burlington Northern, Inc.* v. *United States,* 549 F.2d 83, 88-89 (8th Cir. 1977). We are also satisfied that substantial evidence on the record as a whole supports the administrative decision. *See Giles Lowery Stockyards, Inc.* v. *Dep't of Agriculture, supra,* 565 F.2d at 326-27. Furthermore, we are persuaded that petitioners had sufficient notice of the method of computation to be used in the hearing so that they could prepare their case. Finally, we are persuaded that the effect of the rates contained in the Secretary's order cannot be said to be unjust and unreasonable. Accordingly, the petition to review and set aside the Secretary of Agriculture's order is denied.

ROSS, Circuit Judge, Dissenting.

I would grant the petition to review, set aside the Secretary of Agriculture's order and remand to the Secretary with directions to adopt the findings and recommendations of the administrative law judge. In my opinion the figures furnished to us, at the request of the court, show that the rates established by the Secretary are confiscatory, arbitrary and capricious. According to the figures provided by the Secretary, the order provides for *lower* rates than those in effect prior to the requested increase, rather than higher rates proposed by petitioners.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

PACKERS AND STOCKYARDS ACT, 1921

Cite as 36 A.D. 764

(No. 17,772)

In re CENTRAL ARKANSAS AUCTION SALE, INC. P&S Docket No. 5249; MAJOR LEWIS, d/b/a MAJOR LEWIS LIVESTOCK AUCTION SALES. P&S Docket No. 52650; BILL RICE and LOIS RICE, d/b/a CLEBURNE COUNTY LIVESTOCK AUCTION SALE. P&S Docket No. 5251; TRAVIS MCGEE, d/b/a ATKINS LIVESTOCK AUCTION. P&S Docket No. 5252. Decided May 6, 1977.

Respondents' proposed rates and charges—unjust, unreasonable, and discriminatory—Complainant's proposed schedule of rates and charges—adoption of

Where the rates and charges proposed by the respondents are unjust, unreasonable, and discriminatory, each respondent, or successor thereto, shall cease and desist from demanding or collecting for stockyard services any rate or charge other than those found by the Secretary to be just, reasonable and nondiscriminatory as set forth in the Order herein.

Victor W. Palmer, Administrative Law Judge.

Eric Paul, for complainant.

George F. Hartje, Conway, AR, for respondents.

Decision by Donald A. Campbell, Judicial Officer.

DECISION AND ORDER

PRELIMINARY STATEMENT

This is a consolidated proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*), involving the rates and charges assessed by the four respondents for rendering services at their auction stockyards located in central Arkansas.

On January 13, 14, and 15, 1976, the four respondents filed with complainant proposed increases in their rates and charges which were to go into effect on February 1, 1976. The proposed schedules of rates and charges would have increased the percentage charges then in effect from 3% of the first $2,000 of gross sales proceeds obtained for a consignor plus 2% on any sum above $2,000 (except the Rices' charged a straight 3%), to 4% of the first $2,000 plus 3% on any sum above $2,000.

Respondents furnished no information in support of the increases when they filed the proposed schedules. Thereafter, complainant concluded on the basis of the proposed tariffs and respondents' annual reports that the proposed rates would be unjust, unreasonable and/or discriminatory. Complainant filed a separate Complaint, Order of Suspension, and Notice of Hearing for each respondent on January 30, 1976, and suspended the operation of the proposed rates for a total of 60 days.

After a full hearing, an Initial Decision was filed by Administrative Law Judge Victor W. Palmer on November 19, 1976, proposing rates higher than recommended by complainant, but different than respondents' proposals. Both sides appealed to the Judicial Officer, to whom final

administrative authority has been delegated to decide appeals from Initial Decisions (38 F.R. 10795; 42 F.R. 4395).[1]

RELEVANT STATUTORY PROVISIONS

The Packers and Stockyards Act defines the term "stockyard" to mean "any place, establishment, or facility commonly known as stockyards, conducted, operated, or managed for profit or nonprofit as a public market for livestock producers, feeders, market agencies, and buyers, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held or kept for sale or shipment in commerce" (7 U.S.C. 202(a)).

After the Secretary ascertains that a stockyard comes within the statutory definition, he is required to "give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine" (7 U.S.C. 202(b)). Such stockyards are referred to as "posted" stockyards.

The Act defines the term "stockyard owner" to mean "any person engaged in the business of conducting or operating a stockyard" (7 U.S.C. 201(a)). The term "market agency" is defined as "any person engaged in the business of (1) buying or selling in commerce livestock

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1. The office of Judicial Officer is a career position established pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1970 ed., Appendix p. 550). The present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

on a commission basis or (2) furnishing stockyard services" (7 U.S.C. 201(c)).

"Stockyard services" means "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce of livestock" (7 U.S.C. 201(b)).

Section 304 of the Act states that "[a]ll stockyard services furnished pursuant to reasonable request made to a stockyard owner or market agency at such stockyard shall be reasonable and nondiscriminatory and stockyard services which are furnished shall not be refused on any basis that is unreasonable or unjustly discriminatory" (7 U.S.C. 205).

Section 305 of the Act provides that "[a]ll rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared unlawful" (7 U.S.C. 206).

Section 306 of the Act provides (7 U.S.C. 207):

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the

person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it has become effective. If any such hearing cannot be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subsection (a) of this section, no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such

stockyard any stockyard services except such as are specified in such schedules.

Section 310 of the Act provides that whenever after full hearing the Secretary is of the opinion that any rate or charge of a stockyard owner is or will be unjust, unreasonable or discriminatory, the Secretary may determine and prescribe what will be the just and reasonable rates or charges to be thereafter in such case observed as both the maximum and minimum to be charged (7 U.S.C. 211). Specifically, § 310 of the Act provides (7 U.S.C. 211):

> Whenever after full hearing upon a complaint made as provided in section 210 of this title, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—
>
> (a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be just, reasonable and nondiscriminatory to be thereafter followed; and
>
> (b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing

> of stockyard services more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed.

Section 313 of the Act provides that orders of the Secretary prescribing rates and charges "shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction" (7 U.S.C. 214).

RELEVANT PROVISIONS OF THE REGULATIONS

Section 201.43(b) of the regulations provides (9 CFR 201.43(b)):

> (b) *Purchasers to pay promptly for livestock.* Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and the determination of the amount of the purchase price, transmit or deliver to the seller or his duly authorized agent the full amount of the purchase price, unless otherwise expressly agreed between the parties before the purchase of the livestock. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction. The provisions of this section shall not be construed to permit any transaction prohibited by § 201.61(a) relating to financing by market agencies selling on a commission basis.

Section 201.17(b) of the regulations provides (9 CFR 201.17(b)):

> (b) The term "yardage" shall be used in schedules of rates and charges filed by stockyard owners on and after September 1, 1954, to describe the basic stockyard facilities and services furnished, and shall, unless otherwise indicated therein, include: the use of suitable facilities for the safe and expeditious receiving, handling, feeding, watering, holding, sorting, selling, buying, weighing, delivery, and shipment of livestock; the services necessary and incident to the receiving of livestock at the place of unloading; the furnishing of receipts for livestock to the carrier or consignor; the delivery of livestock to the consignee; the obtaining of receipts evidencing delivery of livestock to the sales pens assigned to the consignee; the furnishing of sufficient potable water for livestock; the initial weighing of livestock when sold and delivered to scales; the issuance of scale tickets showing actual weight and other pertinent information concerning the livestock weighed; the removal of livestock from scales after weighing and delivering to holding pens; the holding of livestock for a reasonable time pending delivery or shipment to buyers; the delivery of livestock to buyers; and the obtaining of receipts for livestock delivered to buyers. Consignors, market agencies, dealers, packers, buyers, or other users of stockyard facilities and services requiring special facilities or services in addition to the basic facilities and services furnished at the stockyard may be required to pay a reasonable charge for such special facilities and services in addition to basic yardage charges.

Section 201.25 of the regulations provides (9 CFR 201.25):

> Each stockyard owner, market agency, and licensee proposing an increase in existing charges, either by supplement, or tariff proposing the increase in or by submission of a new tariff, shall forward with the supplement, amendment, or tariff proposing the increase information as to the reasons for the proposed increase and shall furnish specific and detailed data on which the proposed increase is based together with such additional information as the Administrator may require.

Section 201.97 of the regulations provides (9 CFR 201.97):

> Every packer, stockyard owner, market agency, dealer (except a packer buyer registered to purchase livestock for slaughter only), and licensee shall file annually with the Administration a report on prescribed forms not later than April 15 following the calendar year end or, if the records are kept on a fiscal year basis, not later than 90 days after the close of his fiscal year. The Administrator on good cause shown, or on his own motion, may grant a reasonable extension of the filing date or may waive the filing of such reports in particular cases.

FINDINGS OF FACT[2]

I. *Complainant's Procedure for Analyzing Auction Market Rates.*

Complainant's rate procedure for auction stockyards is designed to produce rates that will provide sufficient rev-

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2. In view of the many issues presented in this proceeding and the length of this Decision, some conclusions are included with the findings of fact.

enue to cover all reasonable expenses, including depreciation, and provide a reasonable return to the market operator for his labor and investment.

A. *Unchallenged Expenses Accepted by Complainant.*

1. Complainant's rate analysis for each auction stockyard begins with an examination of the stockyard's cost of operation for the base year (the most recent year for which statistics are available). Any expenses which complainant determines are not properly chargeable to the stockyard are subtracted from the market's claimed expenses. However, most of the market's expenses are presumed to be reasonable and necessary for efficient operation of the stockyard. For example, the complainant accepted as reasonable and necessary the following expenses claimed by respondents for the base year 1974:

Major Lewis Expenses Accepted as Reasonable

Salaries and bonuses paid employees	—	$64,449.55
Federal and State Unemployment Insurance	—	662.91
Other insurance	—	8,649.99
Telephone and other utilities	—	4,548.53
Taxes other than income taxes	—	4,422.27
Rent	—	38,076.00
Depreciation on trucks	—	2,417.93
Repairs and maintenance	—	9,921.68
Office and yard supplies	—	5,555.05
Bank charges	—	799.64
Laundry	—	45.08
Auctioneer	—	7,182.00
TOTAL		$146,730.63

Central Arkansas Expenses Accepted as Reasonable

Salaries and bonuses to employees	—	$20,849.49
Federal and State Unemployment Insurance	—	642.50
Other insurance	—	889.00
Telephone and other utilities	—	1,933.64
Licenses and bond premiums	—	350.00
Taxes, other than income taxes	—	1,592.20
Legal and accounting fees	—	110.00
Depreciation	—	1,577.46
Office and yard supplies	—	4,098.82
Repair and maintenance of buildings, structures and equipment	—	5,482.39*
TOTAL		$37,525.50

Travis McGee Expenses Accepted as Reasonable

Salaries and bonuses paid employees	—	$26,095.85
Federal and State Unemployment Insurance	—	334.00
Other insurance	—	2,066.50
Telephone and other utilities	—	1,082.14
Licenses and bond premiums	—	300.00
Taxes, other than income taxes	—	1,569.99
Legal and accounting fees	—	605.00
Depreciation on buildings and structures	—	2,064.00
Repairs and maintenance of buildings and equipment	—	501.72
Office and yard supplies	—	2,693.10
Auctioneer	—	2,903.00
Test scales	—	158.55
TOTAL		$40,373.85

*An additional $4,000 claimed for this item was disallowed as excessive.

Bill and Lois Rice Expenses Accepted as Reasonable

Wages	—	$ 8,580.00
Payroll tax	—	821.60
Wages paid auctioneer	—	1,820.00
Office expense	—	978.00
Utilities	—	1,287.94
Telephone	—	1,173.00
Fuel	—	470.00
Wages paid minor children	—	1,820.00
Bond	—	170.00
Bank charges	—	138.00
Scale test	—	150.00
Box rent	—	20.00
Legal & audit	—	100.00
Insurance	—	1,840.00
License	—	403.00
County tax	—	243.00
Depreciation	—	7,818.81
TOTAL		$27,833.35

The foregoing unchallenged expenses, amounting to $146,731, $37,526, $40,374, and $27,834, are 65%, 62%, 60% and 53%,[3] respectively, of the total expenses claimed by respondents for the base year 1974. All of the unchallenged expenses reflect, of course, the individual circumstances at each market.

3. The lower percentage of expenses accepted as claimed by Bill and Lois Rice resulted from their failure to properly separate their dealer expenses from their auction market expenses. This failure resulted in a further reduction of their claimed expenses (see Finding 116, *infra*).

B. *Four Categories of Expenses Replaced by Allowances.*

2. Four categories of expenses which complainant concedes are properly regarded as expenses of an auction stockyard are subtracted and later replaced by allowances which complainant determines to be reasonable for such expenses. Such allowances may be more or less than the actual expenses of the market. The expenses replaced by allowances are as follows:

First, the compensation paid by a market to an owner for his work and for his management is removed and replaced by allowances for work and management, ordinarily determined by complainant's formula.

Second, interest paid by the stockyard is removed from the total expenses, and an allowance is later included for a return on working capital. Third, bad debts are excluded and replaced by an allowance based on industry averages.

Fourth, "Business Getting and Maintaining" expenses are removed and replaced by an allowance. The category of Business Getting and Maintaining expenses includes losses sustained by the market as market support activities. Market support is the term used to describe the bidding by a market operator or his representative at auction which bidding ends in the purchase of the animal by the market. Such bids are placed not with the intention of purchasing the animal, but rather to stimulate bids from other buyers. This process is entirely voluntary; many markets do not engage in it.

Animals purchased through market support are either again run through the auction ring at the same market or transported to another market for sale. The market support account at a market is charged with the losses,

if any, associated with disposing of such animals. Where applicable, these losses include transportation costs, feed costs and the difference between the purchase price at which the market bought the animal and the selling price of the animal when the market sold it.

C. *"Adjusted Expenses"—"Total Reasonable Revenue Requirement."*

3. After complainant subtracts (i) any claimed expenses determined to be not properly chargeable to the auction stockyard and (ii) any claimed expenses for the four categories of expenses referred to in Finding 2, *supra* (for which allowances are substituted), the resulting figure is the market's "Adjusted Expenses." To the "Adjusted Expenses," complainant adds allowances for the four categories referred to in Finding 2, *supra,* plus additional allowances for (i) return on buildings and equipment, (ii) use of land and (iii) operating margin. The sum of the Adjusted Expenses and all of the allowances is the market's Total Reasonable Revenue Requirement. This is the amount that the market's future rates should produce.

D. *Amount of Allowances to Replace Four Categories of Expenses.*

4. Complainant's allowance to compensate a working owner begins with a formula which provides 50¢ per animal unit on the first 20,000 units sold at the market during the base year, 25¢ per unit on the next 20,000 and 5¢ per unit for each unit over 40,000. One cattle, one horse or one mule equals one animal unit under this formula. A hog equals one-third of a unit and a sheep equals one-fourth of a unit. The result obtained is tested for reasonableness by comparing it with local guidelines,

such as the highest salary paid to hired auction market employees in the area.

5. Complainant's allowance for management is computed on the basis of 6.25¢ per animal unit sold during the base year. This amount is allowed whether or not the owner is actively engaged in the operation of the market on sale days.

6. Complainant's allowance for a return on working capital is computed on the basis of 1.25¢ per animal unit sold during the base year.

7. Complainant's allowance for bad debts is computed on the basis of .0003 times the gross value of livestock sold during the base period.

8. Complainant's allowance for Business Getting and Maintaining expenses is based on 25¢ per animal unit sold during the base year, or actual, confirmed expenses, whichever is less.

E. *Additional Allowances.*

9. Complainant's allowance for an auction market's return on buildings and equipment is computed on the basis of 10% of the original cost of the buildings (and improvements) and equipment, less depreciation.

10. Complainant's allowance for an auction market's return on land is computed on the basis of 6¢ per animal unit sold during the base year.

11. Complainant's allowance for an operating margin is computed on the basis of 40¢ per animal unit sold during the base year. The purpose of the operating margin is to provide revenue above the actual cost of providing auction services to take care of contingencies.

Otherwise, unexpected changes in costs or revenues would place an unwarranted burden on the market operator during the period it would take him to secure a rate change. In addition, the margin makes it unnecessary to request frequent rate increases. The margin also includes an allowance for the market's income taxes, if any; but most auction markets do not have to pay income taxes as a separate entity from the owners.

F. *Per-Head-Weight Tariffs Are Required for Prescribed Rates Rather than Value-Based Tariffs.*

12. Complainant's proposed tariffs are based on per-head-weight schedules, as opposed to the valuation type tariffs presently in effect at respondents' markets (such as 4% of the first $2,000 of gross sales proceeds). For example, complainant's proposed tariff for Major Lewis would provide for a combined selling and yardage charge[4] of $1.85 per head for cattle weighing less than 300 pounds, and $2.50 per head for cattle weighing 300 pounds or more. A per-head-weight schedule provides for rates that are stable, regardless of price fluctuations. Such a schedule, unlike a value-based tariff, is nondiscriminatory, and can reflect accurately and uniformly the cost of the service performed.

13. Per-head tariffs best meet the public interest requirements for just, reasonable and nondiscriminatory

4. Each of the respondents provides the full range of normal stockyard services at their stockyards. Respondents' proposed tariffs contain separate charges for selling commissions and yardage. The assessment of one charge for all services rendered will simplify the schedules of rates and charges. Moreover, the present system of separate charges for yardage and selling is misleading since respondents cannot possibly receive adequate compensation for the total of services included the term "yardage" out of the per-head charge so labeled. Accordingly, respondents should make one charge on the livestock they sell covering all services they render.

rates. For reasonable rates, an auction market's total income should be about the same as its Total Reasonable Revenue Requirement. For all markets, the total income received should not significantly differ from their combined Total Reasonable Revenue Requirements (CX 72, pp. 63-65, 102; RX1, pp. 31-32). The per-head tariff is the best method to generate such reasonable rates, both to the consignors and to the market (CX 72, pp. 64-65, 102). This is also the best method to properly allocate the relative costs among the different livestock types to minimize discrimination, although no market precisely charges the actual cost of marketing each type of livestock (CX 72, p. 76; Tr. 296). Requirements of reasonableness and nondiscrimination are met when the commission for a particular type of livestock is based on its "reasonable" marketing cost.

14. The quality of selling services is not affected by the type of tariff because value-based tariff markets, in practice, are not provided with a greater incentive than per-head tariff markets to get the highest bid because of the additional selling commission. For example, an increase of $.25 per cwt. for a Choice 400-pound feeder steer would give $1.00 additional money to the consignor, but only $.04 more commission to a market using a 4% tariff. An auction market, regardless of tariff type, attempts to get the best price for consigned livestock (Tr. 540-541). The increased business from satisfied consignors and neighboring farmers is the best incentive for getting the higher price—not a marginal increase in revenue of only a few cents to the market owner.

At a percent tariff market, each consignor receives the same quality of service regardless of his particular livestock value. If auctioneers at such markets favored

high value livestock, that would cause the market to lose business (Tr. 540-541). Furthermore, for percent markets, the selling time and livestock value are not significantly related (CXs 92-95; Tr. 496); that is, it takes the same average time to sell a head of cattle regardless of value (CXs 92, 93, 94).

A study conducted by the University of Kentucky compared net returns (*i.e.*, after subtracting selling commissions) for comparable classes, grade and weight of cattle sold under percent tariffs and under per-head tariffs. The study concluded (Bobst, Barry, *Area Comparisons of Auction Market Selling Costs and Returns for Cattle and Calves in the South*, Bulletin No. 154, Southern Cooperative Series, University of Kentucky, 1971, pp. 25-27):

> These findings refute the hypothesis that high selling costs [commission charges on the value of the animal being sold] were counteracted by higher prices, leaving net returns to producers at least equal to those in subregions having low selling costs [per head tariffs]. Instead, the evidence indicates that the subregions having higher selling costs also had lower net returns [gross selling amounts minus commission] to producers.

15. Value-based rates tend to be unreasonably high. Markets with value-based tariffs tend to receive income in excess of their Total Reasonable Revenue Requirements (CX 72, pp. 4, 62-64, 102, 104). For example, in 1972, markets with value-based tariffs averaged $22,000 excessive income per market (CX 72, pp. 62-66).

Markets with value-based tariffs tend to spend significantly more for total reported expenses than markets with per-head tariffs—taking market size into consideration

(CX 72, 64-69, 103). This means that total expenses for value-based tariff markets tend to be significantly more than for per-head tariff markets for the same size market. Value-based tariff markets tend to spend more than a reasonable amount to provide the same services as per-head tariff markets. Some important individual categories of expenditures also tend to differ significantly by type of tariff. The percent tariff markets tend to spend significantly more than the per-head tariff markets in four categories—taking market size into consideration. These are employees' salaries and bonuses, business-getting and maintaining expenses, miscellaneous expenses and feeding expenses (CX 72, pp. 69-75, 103).

The higher income generated by the markets using the value-based tariffs, especially the percent tariffs, partially explains why such markets can spend more. High market income permits management to spend more for activities that attract consignors. Such activities might involve "guaranteeing" higher prices because total market income is sufficient to cover losses on "caught" animals. There also may be more employees than needed to provide adequate service (CX 72, p. 74).

16. Under percentage tariffs, there is a wide variation in unit selling charges arising from fluctuations in livestock prices, which variation has no relation to the cost of providing the selling services (CXs 44-62, 72; Tr. 51, 64, 120-122, 251, 296, 520). Livestock prices vary for individual animals during each sale. Prices fluctuate hourly, daily and weekly (Tr. 121, 559). Selling charges constructed upon a percentage charge based on gross proceeds result in discriminatory charges. Shippers of livestock receiving the same or similar services must pay the same rates and charges for the rates to be nondiscrimina-

tory (Tr. 93). The following table illustrates the discriminatory charges that would result if 3% and 4% tariffs were applied to an actual auction sale conducted in October 1975 (CX 44):

Lowest and Highest Selling Charges by 100 Pound Weight Brackets for Cattle and Calves

Weight Bracket (lbs.)	Low Value * (Per Head)	3% Tariff	4% Tariff	High Value * (Per Head)	3% Tariff	4% Tariff
100-199	$ 10.80	$ .32	$ .43	$ 37.50	$ 1.12	$ 1.50
200-299	12.25	.36	.49	63.80	1.91	2.55
300-399	19.25	.57	.77	115.50	3.46	4.62
400-499	23.50	.70	.94	133.65	4.00	5.34
500-599	28.00	.84	1.12	171.10	5.13	6.84
600-699	18.00	.54	.72	253.67	7.61	10.14
700-799	7.55	.22	.30	296.40	8.89	11.85
800-899	81.00	2.43	3.24	326.00	9.78	13.04
900-999	106.92	3.20	4.27	405.30	12.15	16.21
1000 and over	161.60	4.84	6.46	438.60	13.15	17.54

In each of the 10 weight brackets shown in the preceding table, the charges for the lowest and highest value animals vary significantly. In the 700-799 lbs. bracket, the charges reach a maximum variation of 3,940% for the 3% rate (22¢ v. $8.89).

The following table illustrates how changes in the value of livestock during a two-year period would affect the rates charged by an auction market using a 4% rate (CX 46):

*Total value of animals sold.

Selling Charges for Highest and Lowest Value Cattle Computed at 4 Percent Rate

Date of Sale	500-599 lbs. Low Value	Low Charge *	500-599 lbs. High Value	High Charge *	1000 lbs. and over Low Value	Low Charge *	1000 lbs. and over High Value	High Charge *
11-12-73	$ 66.60	$2.66	$266.17	$10.64	$290.00	$11.60	$553.80	$22.15
12-10-73	29.50	1.18	250.80	10.03	270.00	10.80	655.87	26.23
1-14-74	142.50	5.70	316.10	12.64	321.60	12.86	787.65	31.50
2-11-74	146.45	5.85	298.35	11.93	288.75	11.55	657.90	26.31
3-11-74	109.00	4.36	274.95	10.99	253.00	10.12	727.75	29.11
4-8-74	100.00	4.00	248.69	9.94	320.31	12.81	727.39	29.09
5-13-74	109.35	4.37	223.17	8.92	266.25	10.65	695.62	27.82
6-10-74	114.45	4.57	194.70	7.78	261.30	10.45	441.67	17.66
7-8-74	115.00	4.60	246.32	9.85	282.15	11.28	745.50	29.82
8-12-74	75.75	3.03	211.70	8.46	223.65	8.94	599.32	23.97
9-9-74	85.00	3.40	190.12	7.60	189.37	7.57	590.51	23.62
10-14-74	34.77	1.39	168.15	6.72	145.60	5.82	445.50	17.82
11-11-74	53.50	2.14	174.04	6.96	171.69	6.86	319.20	12.76
12-9-74	40.80	1.63	159.30	6.37	45.41	1.81	474.87	18.99
1-13-75	65.00	2.60	159.60	6.38	99.20	3.96	586.50	23.46
2-10-75	70.20	2.80	159.60	6.38	186.15	7.44	420.19	16.80
3-10-75	61.52	2.46	140.12	5.60	151.50	6.06	454.69	18.18
4-14-75	11.34	.45	163.62	6.54	86.80	3.47	446.12	17.84
5-12-75	63.00	2.52	197.65	7.90	218.91	8.75	517.00	20.68
6-9-75	25.75	1.03	220.84	8.83	164.94	6.59	728.17	29.12
7-14-75	5.25	.21	197.95	7.91	176.81	7.07	492.96	19.71
8-11-75	27.75	1.11	169.50	6.78	169.60	6.79	454.21	18.16
9-8-75	33.90	1.35	194.70	7.78	166.65	6.66	432.60	17.30
10-13-75	28.00	1.12	171.10	6.84	161.60	6.46	438.60	17.54

The foregoing table illustrates that under a 4% tariff, the charges to users of similar services each day during this period would be highly discriminatory, with some rate payers paying from 2 to 14 times as much as other rate payers on the same day for the same service.

*Selling charges based on 4% of the gross sales value.

17. A schedule of rates and charges constructed upon a percentage charge based on gross proceeds is incapable of providing revenue that can be reasonably and accurately predicted for any future time period. Such a tariff is unreasonable either to the market operator or the rate payer since the market's revenue (charges to the rate payer) fluctuates with changes in the price of livestock, and such fluctuations bear no relation to changes in the cost of providing stockyard services.

For example, during 1972, Major Lewis handled 71,747 animal marketing units valued at $11,853,480. He received total revenue of $333,329, and his Total Reasonable Revenue Requirement was $222,594. In 1973, with 65,502 animal marketing units valued at $16,048,541, he received total revenue of $444,931, and his Total Reasonable Revenue Requirement was $229,471. The units of livestock decreased 9% but their value increased 35%. The Total Reasonable Revenue Requirement increased only 3%, while the total revenue received increased 33%. In 1974, his marketing units increased 15% to 75,165, gross value decreased 39% to $9,771,420, revenue received decreased 39% to $273,311 and his Total Reasonable Revenue Requirement decreased 3% to $222,871.

18. Fluctuating livestock prices should not be included in the determination of market income. This introduces a variable which has nothing to do with the market's Total Reasonable Revenue Requirement and introduces instability in the market's income. Information is available to indicate the relative change in commission (market income) for value-based tariff markets—holding volume constant. This is the index of prices received by farmers for meat animals (*Index Numbers of Prices Received and Prices Paid by Farmers,* Statistical Reporting Service, USDA, Pr 1-5 (76), May 1976, p. 31). This index for

1972-75 on an annual basis and for the first four months of 1976 is as follows:

Index of Prices Received by Farmers for Meat Animals

Year	*1967=100*	*1972=100*
1972	148	100
1973	198	134
1974	165	111
1975	169	114
1976 (4 mos.)	178	120

Livestock prices in 1973 were the highest on record (CXs 65, 68, 69), resulting in even more excessive incomes for value-based tariffs than in 1972 (see Finding 15, *supra*). The extremely low livestock prices, especially in the last quarter of 1974 and first quarter of 1975 (averaging 146 on an index of 1967 = 100 (CX 65)), forced a number of percent tariff markets to ask complainant for rate increases (Tr. 42, 68).

G. *Constructing Per-Head Weight Tariff to Produce Total Reasonable Revenue Requirement*

19. Complainant's proposed tariffs reflect insofar as practicable the differing costs involved in handling different types of animals. For example, light weight cattle require less pen space; bulls and pairs require more services. Complainant's proposed tariff brackets are in accord with the historical design of per-head tariffs in the industry and reflect the desires of market operators (Tr. 209, 421).

Complainant's estimates of the total volume and types of animals to be received at a market, like the determination of the market's reasonable marketing expenses, are based on the most recent data available. However, the most recent expense data in this proceeding came from

the respondents' annual reports for 1974, whereas complaint had volume data for 1975. The 1975 volume data was adjusted downward by 6% to reflect the 6% decrease in the January 1, 1976, State of Arkansas inventory compared to January 1, 1975. Complainant received expert advice as to its 1976 volume forecasts from the Department's Economic Research Service (CX 71; Tr. 91-101), and considered each market's prior volume history for a number of years. Complainant's total volume estimates for the respondents' 1976 livestock receipts are reliable for rate-making purposes.

To break down each market's 1976 estimated volume into types, complainant obtained a 12-month sample of each respondent's actual receipts, by types, for the period ending March 1976, the month prior to the hearing in this proceeding. The sample was made of all sales held during the second week of every other month during that 12-month period (CXs 74-77). This sample affords a reliable basis for estimating for the future the types of animals that will be received at each market, including their weight classifications, and how many will be offered as pairs (Tr. 415). The number of livestock available to be marketed in each tariff bracket (*e.g.*, cattle under 300 lbs., cattle over 300 lbs., bulls and pairs) does not materially change from year to year. If any change occurs it is over time due to shifts in the types of livestock production and changes to other forms of agriculture in an area. These include shifts from livestock to grain, beef production to dairy and beef production to housing and truck farming.

Using the estimates for a market's future livestock receipts, by types, complainant constructs a proposed tariff that will produce, or slightly exceed, the market's Total Reasonable Revenue Requirement.

II. *Specific Findings As to Major Lewis.*

20. Respondent, Major Lewis, d/b/a Major Lewis Livestock Auction Sales, is an individual with his place of business at Conway, Arkansas. Respondent is, and at all times mentioned herein was: (a) engaged in the business of operating a posted stockyard under the Act; (b) engaged in the business of selling livestock on a commission basis at the stockyard and as a dealer buying and selling livestock in commerce; and (c) registered with the Secretary of Agriculture as a market agency to sell on commission and dealer to buy and sell livestock in commerce.

21. Complainant accepted for filing (without determining the reasonableness thereof) respondent's Tariff No. 2 effective January 6, 1961. On January 13, 1976, respondent filed proposed Tariff No. 3 to become effective February 1, 1976, which assessed increased rates and charges for his stockyard services. Complainant concluded, after an analysis of the annual report filed by respondent for the base year 1974, that the proposed rates and charges in Tariff No. 3 were unjust, unreasonable and discriminatory and suspended the operation of the tariff for 60 days.

22. The complainant's cost and revenue analysis based on respondent's annual report for the base year 1974, during which Tariff No. 2 was in effect, is shown in Figure 1, which follows. The individual items on Figure 1 are discussed *seriatim* in the following Findings of Fact.

Major Lewis
d/b/a Major Lewis Livestock Auction Sales
Conway, Arkansas

Cost and Revenue Analysis for Rate Purposes
(Base Period—Year 1974)

			Adjustments (Removals)		
1.	Expenses per Analysis				$225,249
2.	*LESS*:	Interest	$ 8,262		
3.		Legal Fees	1,838		
4.		Vet Supplies	5,042		
5.		Feed	9,314		
6.		TOTAL		$24,456	
7.	*LESS*:	Business Getting and Maintaining Expenses			
8.		Advertising	$ 1,627		
9.		Market Support	52,156		
10.		Refunds	279		
11.		TOTAL		$54,062	
12.	Adjusted Expenses ($225,249 less lines 6 & 11)				$146,731
			Adjustments (Additions)		
13.	Adjusted Expenses				$146,731
14.	*PLUS*:	Compensation for Working Order	$16,758		
15.		Allowance for Owner's Management and Interest on Working Capital	5,637		
16.		Total Allowance for Owner		$22,395	
17.	*PLUS*:	Allowance for Business Getting and Maintaining	$18,791		
18.		Allowance for Bad Debts	2,931		
19.		Allowance for Use of Land (Allowed in Rent Expense)	None		
20.		Return on Improvements and Equipment	1,957		
21.		TOTAL		$23,679	
22.		(Lines 13 + 16 + 21)			$192,805
23.	*PLUS*:	Allowance for Operating Margin		$30,066	
24.		Total Reasonable Revenue Requirement (Line 22 + 23)			$222,871
25.		Total Revenue			273,311
26.		Current Revenue in Excess of Requirement (Line 25 less 24)			$ 50,440

Figure — 1

23. Respondent's total claimed expenses in the rendition of stockyard services during the base year 1974, as shown by his annual report, were $225,249 (Fig. 1, line 1), including market support loss.

24. During the base year, respondent did not claim an expense for a working owner's salary. Nonetheless, an allowance to compensate Mr. Lewis as a working owner was later added (Finding 33, *infra*).

25. During the base year, respondent paid $8,262 in interest (Fig. 1, line 2). This interest expense was removed by complainant on the ground that it should not be borne by the rate payers, but by the market owner. If such interest is not removed, the rate payers would be providing such funds more than once, *viz.*, (i) as a return on the buildings and equipment and an allowance for interest on working capital, and (ii) as an operating expense. However, an allowance for interest on working capital was added (Finding 34, *infra*).

26. During the base year, respondent did not report any bad debt losses. Accordingly, there was no bad debt expense to be removed. However, an allowance for bad debts was later added (Finding 36, *infra*).

27. During the base year, respondent reported $1,838 as legal and accounting fees for stockyard operations (Fig. 1, line 3). Complainant removed this expense item because it was not incurred in the owner's auction business. Judge Palmer held that the evidence does not support the exclusion of this item (Initial Decision, p. 27). But complainant's rate expert, William J. Jones, testified (Tr. 316-319) that he inferred that the legal expenses related to a disciplinary action during the base year involving Major Lewis' dealer activities (see *In re Major Lewis and Henry DeJong*, 33 Agr Dec 1294, decided

September 6, 1974, in which Major Lewis' registration was suspended for 14 days). Respondent produced no evidence to the contrary. Respondent's silence, in the circumstances, gives rise to the strong inference that his testimony would have been adverse.[5] "It is certainly a maxim that all evidence is to be weighted according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted." Lord Mansfield, in *Blatch* v. *Archer*, Cowp. 66, quoted with approval in Wigmore, *Evidence* (3rd ed. 1940), § 285. Complainant's evidence relating to the legal expenses necessarily incurred in the disciplinary action, coupled with the inference arising from respondent's silence, is adequate to support the exclusion of this item.

28. During the base year, respondent paid $5,042 for "vet supplies" (Fig. 1, line 4). Complaint deducted that expense because it should have been charged to those who purchased the supplies or service provided. Those

5. See, Wigmore, *Evidence* (3rd ed. 1940), §§ 285-291; *United States* v. *Di RE*, 332 U.S. 581, 593; *Interstate Circuit* v. *United States*, 306 U.S. 208, 225-227; *Vajtauer* v. *Comm'r of Immigration*, 273 U.S. 103, 111; *Bilokumsky* v. *Tod*, 263 U.S. 149, 153-155; *Kirby* v. *Tallmadge*, 160 U.S. 379, 383; *International Union* v. *N.L.R.B.*, 455 F.2d 1357, 1362-1370 (C.A. D.C.); *Milbank Mutual Insurance Company* v. *Wentz*, 352 F.2d 592, 597 (C.A. 8); *Hoffman* v. *C.I.R.*, 298 F.2d 784, 788 (C.A. 3); *Neidhoefer* v. *Automobile Ins. Co. of Hartford, Conn.*, 182 F.2d 269, 270-271 (C.A. 7); *Illinois Central Railroad Company* v. *Staples*, 272 F.2d 829, 834-835 (C.A. 8); *Bowles* v. *Lentin*, 151 F.2d 615, 619 (C.A. 7), certiorari denied, 327 U.S. 805; *Longini Shoe Mfg. Co.* v. *Ratcliff*, 108 F.2d 253, 256-257 (C.C.P.A.); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F.2d 862, 867-868 (C.A. 2), certiorari denied, 304 U.S. 576; *In re Livestock Marketers*, 35 Agr Dec 1552, 1558 (1976); *In re Whaley and Groover*, 35 Agr Dec 1519, 1522 (1976); *In re Ludwig Casca*, 34 Agr Dec 1917, 1929-1930 (1975); *In re Braxton M. Worsley*, 33 Agr Dec 1547, 1571-1572 (1974); *In re Trenton Livestock, Inc.*, 33 Agr Dec 499, 514 (1974), affirmed *sub nom. Trenton Livestock, Inc.* v. *Butz*, 110 F.2d 966 (C.A. 4); *In re J. A. Speight*, 33 Agr Dec 280, 300-301 (1974); and *In re Sy B. Gaiber & Co.*, 31 Agr Dec 474, 499 (1972).

consignors who did not receive the supplies or service should not pay any part of their cost.

29. During the base year, respondent reported a $9,314 feed expense (Fig. 1, line 5). Complainant removed this item because it should have been charged to owners whose livestock were fed. If this is not done, all consignors must pay part of this cost regardless of the fact that they did not receive anything in return. The tariff for this market states in section IV (Feed) "None fed."

30. During the base year, respondent reported Business Getting and Maintaining expenses totalling $54,062 (Fig. 1, line 11). Of this amount, $1,627 was expended for advertising designed to promote the interests of consignors (Fig. 1, line 8), $52,156 was listed as market support loss (Fig. 1, line 9), and $279 was expended for refunds (Fig. 1, line 10). Complainant deducted all of the Business Getting and Maintaining expenses (Fig. 1, line 11), but added an allowance for this category of expense (Finding 35, *infra*).

31. Subtracting the foregoing deductions totalling $78,518 from respondent's total expenses of $225,249 results in Adjusted Expenses of $146,731 (Fig. 1, line 12), or 65% of respondent's total expenses.

32. During the base year, respondent received on consignment 75,165 animal units, consisting of 75,165 cattle (CX 5, p. 5). This figure is used in computing various allowances referred to below.

33. Complainant added an allowance of $16,758 to compensate Mr. Lewis as a "working owner" during the base year (Fig. 1, line 14; see Finding 4, *supra*). Mr. Lewis' primary function at the weekly auction sale is to

serve as a "starter" (CX 5, p. 7). A starter sets the starting price or opening bid on consigned cattle when such cattle are placed in the auction ring and put up for sale.

34. Complainant added an allowance of $4,697 for Owner's Management (see Finding 5, *supra*) and $940 for Interest on Working Capital (see Finding 6, *supra*), totalling $5,637 (Fig. 1, line 15).

35. Complainant added an allowance of $18,791 for respondent's Business Getting and Maintaining expenses during the base year (Fig. 1, line 17). This allowance was the maximum permitted under complaint's policy, *i.e.*, 25¢ per animal unit sold at auction during the base year (see Finding 8, *supra*).

36. Complainant added an allowance of $2,931 for bad debts (Fig. 1, line 18; see Finding 7, *supra*).

37. Complainant's customary allowance for land was not added (see Fig. 1, line 19) because the land is leased, and the rental expense is included in the unchallenged expenses (see Finding 1, *supra*).

38. Complainant added an allowance of $1,957 as a return on improvements and equipment during the base year (Fig. 1, line 20), computed on the basis of 10% of the original cost of the improvements and equipment less accumulated depreciation (see Finding 9, *supra*).

39. Complainant added an allowance of $30,066 for operating margin (Fig. 1, line 23; see Finding 11, *supra*).

40. Adding all of the allowances, which total $76,140, to respondent's Adjusted Expenses of $146,731 results in a Total Reasonable Revenue Requirement of $222,871 (Fig. 1, line 24).

41. Respondent's total revenue derived from selling commissions and yardage during the base year was reported as $273,091. Of this total, $265,794 was reported as commission income and $7,297 was reported as yardage income (CX 5, p. 4). The yardage charge in Tariff No. 2 was 10¢ per head for all classes and species. Multiplying 10¢ by the 75,165 head of cattle sold during the base year equals $7,517, which is $220 more than reported by respondent. Adding this $220 to respondent's reported revenue of $273,091 results in Total Revenue of $273,311 (Fig. 1, line 25).

42. Complainant determined that the revenue received by the respondent during the base year of $273,311 (Fig. 1, line 25) exceeded his Total Reasonable Revenue Requirement of $222,871 (Fig. 1, line 24) by $50,440 (Fig. 1, line 26) or 23% ($50,440 ÷ $222,871).

43. Respondent's proposed Tariff No. 3 increased his rates and charges 1% on the gross sales price and 15¢ per head (yardage) on all livestock (CX 1). The gross value of livestock sold during the base period was $9,771,420. The 1% increase in charges applied to that amount would result in an increase in revenue of $97,714. The 75,165 head of livestock multiplied by the 15¢ increase in yardage would result in $11,275 additional revenue. The combination of these two amounts is $108,989. The $108,989 plus the $50,440 excess revenue already generated under the prior tariff (Finding 42, *supra*) would produce a projected excess revenue of $159,429 based on the value and volume of livestock handled during the base year, or 72% more than the Total Reasonable Revenue Requirement ($159,429 ÷ $222,871). Moreover, respondent's reasonably anticipated livestock volume for 1976 is 20% higher than for the base year 1974, which would tend to increase his

1976 revenue by an additional 20%, if the value of livestock in 1976 remained the same as in the base year.

However, since the great bulk of respondent's revenue is derived from rates and charges which are based on the value of livestock sold, complainant cannot estimate with accuracy the total revenue or the revenue in excess of the Total Reasonable Revenue Requirement that will be generated by respondent's proposed tariff for any future period. For example, the average price per hundredweight (cwt.) for a 400 pound feeder steer in Arkansas during 1974 was $38.12. The average price during the first five months of 1976 for the same 400 pound feeder steer in Arkansas was $39.80 per cwt.,[6] a 4.4% increase. Although the total revenue to be received by respondent in 1976 cannot be estimated with accuracy, it can reasonably be predicted that respondent's total revenue in 1976 will substantially exceed his Total Reasonable Revenue Requirement.

Respondent's proposed Tariff No. 3 is and will be unjust, unreasonable and discriminatory.

44. Complainant's proposed schedule of rates and charges (CX 81) would, based on the reasonably anticipated volume of 90,430 animal units for 1976 (computed from CX 78; Tr. 418-419), produce $223,104.75 (CX 78), which is slightly more than respondent's Total Reasonable Revenue Requirement. Complainant's proposed rates and charges are just, reasonable and nondiscriminatory and are the rates and charges which respondent should assess and collect for his services and the use of his facilities.

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6. Source: Monthly price data, Livestock Market News Branch, Livestock Division, AMS, USDA.

III. *Specific Findings As to Central Arkansas Auction Sale, Inc.*

45. Respondent, Central Arkansas Auction Sale, Inc., is a corporation with its place of business at Morrilton, Arkansas. Respondent is, and at all times mentioned herein was: (a) engaged in the business of operating the Central Arkansas Auction Sale, Inc., a posted stockyard under the Act; (b) engaged in the business of selling livestock on a commission basis at the stockyard; and (c) registered with the Secretary of Agriculture as a market agency to sell livestock in commerce.

46. Complainant accepted for filing (without determining the reasonableness thereof) respondent's Tariff No. 1 effective March 2, 1971. On January 13, 1976, respondent filed proposed Tariff No. 2 to become effective February 1, 1976, which assessed increased rates and charges for its stockyard services. Complainant concluded, after an analysis of the annual report filed by respondent for the base year 1974, that the proposed rates and charges in Tariff No. 2 were unjust, unreasonable and discriminatory, and suspended the operation of the tariff for 60 days.

47. The complainant's cost and revenue analysis based on respondent's annual report for the base year 1974, during which Tariff No. 1 was in effect, is shown in Figure 2, which follows. The individual items on Figure 2 are discussed *seriatim* in the following Findings of Fact.

Central Arkansas Auction Sale, Inc.
Morrilton, Arkansas

Cost and Revenue Analysis for Rate Purposes
(Base Period—Year 1974)

			Adjustments (Removals)		
1.	Expenses per Analysis				$60,906
2.	*LESS*:	Compensation to Owner-Officers	$13,355		
3.		Bad Debts	33		
4.		Charity & Contributions	130		
5.		Excess Repairs	4,000		
6.		TOTAL		$17,518	
7.	*LESS*:	Business Getting & Maintaining Expenses			
8.		Market Support		5,862	
9.	Adjusted Expenses ($60,906 less lines 6 & 8)				$37,526
10.	Adjusted Expenses				$37,526
11.	*PLUS*:	Compensation for Owner-Officers	$ 8,612		
12.		Allowance for Owner-Officers' Management and Interest on Working Capital	1,292		
13.	Total Allowance for Owner-Officers			$ 9,904	
14.	*PLUS*:	Allowance for Business Getting and Maintaining	$ 4,306		
15.		Allowance for Bad Debts	660		
16.		Allowance for Use of Land	1,033		
17.		Return on Buildings and Equipment	2,754		
18.		TOTAL		$ 8,753	
19.		(Lines 10 + 13 + 18)			$56,183
20.	*PLUS*:	Allowance for Operating Margin		$ 6,890	
21.	Total Reasonable Revenue Requirement (Line 19 + 20)				$63,073
22.	Total Revenue per Annual Report				$58,863
23.	Current Revenue in Excess of Requirement (Line 22 minus 21)			minus (—$ 4,210)	

Figure — 2

48. Respondent's total claimed expenses in the rendition of stockyard services during the base year 1974, as shown by its annual report, were $60,906 (Fig. 2, line 1), including market support loss.

49. During the base year, respondent paid the three owner-officers of the corporation $13,355. This was removed by complainant (Fig. 2, line 2) since it was not an amount arrived at through arms-length bargaining (Tr. 23-24). However, an allowance to compensate the officers for services performed at the auction sale was later added (Finding 57, *infra*).

50. During the base year, respondent did not report any interest expense. However, an allowance for interest on working capital was added by complainant (Finding 58, *infra*).

51. During the base year, respondent incurred bad debt losses of $33, which were removed by complainant (Fig. 2, line 3). A bad debt allowance was later added (Finding 60, *infra*).

52. During the base year, respondent paid $130 for "charity and contributions" (Fig. 2, line 4). These expenses were properly removed by complainant because it is not considered reasonable that rate payers make involuntary donations to charities not of their choice (Tr. 27). The principle of requiring that stockholders rather than rate payers make contributions to charities was supported by the California Supreme Court in *Pacific Telephone and Tel. Co.* v. *Public Utilities Com'n*, 44 Cal. Rptr. 1, 401 P.2d 353, 374-375. Similarly, the Maryland Court of Appeals held that an allowance of charitable contributions "amounts to an involuntary levy on the ratepayers." See *Chesapeake and Potomac Tel. Co.* v. *Public Service Com'n*, 230 Md. 395, 187 A.2d 475, 485, and cases cited therein.

Judge Palmer refused to disallow this item because of the absence of proof upon audit that an *exception* did not prevail, *i.e.*, relating to donations that promote harmonious employer-employee relations (Initial Decision, p. 32). The narrow exception, which in practice very rarely applies at auction stockyards, was stated in *In re Market Agencies at Sioux City Stockyards*, 9 Agr Dec 4, 83 (1950), involving a terminal stockyard, as follows:

> A question was raised at the hearing as to the extent, if any, gifts, donations and the like made by the agencies should be included in expenses and passed to patrons in the rates they pay. This question has been presented in every rate case which has arisen under the Packers and Stockyards Act. The procedure followed in all these cases has been to include those gifts and donations which tend to improve the morale of workers or to promote harmonious employer-employee relationships and to exclude all those of a general nature which benefitted the communities in which the agencies lived. Examples of excluded expenses are: donations to the Red Cross, American Cancer Society, Sioux City Community Fund, United Jewish Appeal, American Legion, Y.M.C.A., Salvation Army, Morningside College, Sioux City Chamber of Commerce, and to various churches. These donations should be borne by the agencies since they determine whether to make them, how much to give, and since their own community benefits through them. The procedure of disallowing this type of expense has been followed in all other commission rate cases, has been sanctioned by the courts, and is followed in this proceeding.

Under this narrow exception, contributions, *e.g.*, to an employee welfare or gift fund or to an employee

bowling or softball team would be allowed by complainant. But all donations regarded as charitable donations or general contributions for the benefit of the community are excluded. Respondent submitted no evidence that its claimed $130 expense for "Charity and contributions" came within the terms of that narrow exception. It is well settled that the burden rests on a person asserting or relying on an exception to demonstrate that the facts are within the strictly construed terms of the exception. *Piedmont & Northern Ry.* v. *Comm'n*, 286 U.S. 299, 311-312; *United States* v. *Morrow*, 266 U.S. 531, 534-536; *Spokane & Inland R.R.* v. *United States*, 241 U.S. 344, 350; *Schlemmer* v. *Buffalo, Rochester, &c. Ry.*, 205 U.S. 1, 10; *Shilkret* v. *Musicraft Records*, 131 F.2d 929, 931 (C.A. 2), certiorari denied, 319 U.S. 742; *Detroit Edison Co.* v. *Securities & Exchange Commission*, 119 F.2d 730, 739 (C.A. 6), certiorari denied, 314 U.S. 618; *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Com'n.*, 106 F.2d 667, 674 (C.A. 3), certiorari denied, 308 U.S. 625.[7]

53. During the base year, respondent paid $9,482 for repairs and maintenance of building, structures and equipment. Of this total, $4,000 was deducted (Fig. 2, line 5) on the ground that it was expended for capital improvements or betterments (Tr. 334). Judge Palmer held that "since the P&SA challenge is based neither upon an audit of respondents' records nor upon an inspection of the market's physical structure, being an estimate only, this $4,000 amount has not been found to be improper and is therefore restored" (Initial Decision, p. 32).

I disagree with Judge Palmer's conclusion. Complainant removed $4,000 of the reported $9,482.30 expense for

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7. Also, I infer from respondent's silence that any evidence offered by respondent would have been adverse to respondent (see Finding 27, *supra*).

repairs and maintenance because it considered the full amount excessive (Tr. 334). This pragmatic adjustment was made by complainant's rate expert, William J. Jones, based upon his review of respondent's annual reports and his learning from personnel of complainant's Area Office that respondent had made capital improvements at the stockyard (new pens, paving, roof constructed over area of pens, etc.). The annual reports disclosed that respondent's repairs and maintenance expenses were unusually high, *i.e.*, 20% of the original cost of buildings and equipment in 1973 and 18% in 1974 (CX 35). Respondent's annual reports show the original cost of buildings and equipment remaining at $53,464, although it made capital improvements. The repairs and maintenance expenses which guided Mr. Jones were:

1969	$ 4,997.37
1970	$ 3,966.91
1971	$ 4,751.03
1972	$ 8,974.08
1973	$10,698.89
1974	$ 9,482.39

The evidence supports complainant's determination that the repairs and maintenance expenses were unreasonable and not normal for the base period, and that $5,482.39 is a reasonable amount to be included as legitimate repairs and maintenance (Tr. 334, 407-412, 458). The only witness who testified on behalf of the respondent, Mr. Sherman Durham, admitted that he did not know whether the $9,482.39 reported was expended in normal maintenance (Tr. 657). The respondents requested and were granted a continuance specifically to enable their accountants to review the adjustments made by complainant's witness William J. Jones. The failure of respondent to present

any evidence contradicting complainant's evidence gives rise to the strong inference that such evidence would have been adverse to respondent (see Finding 27, *supra*).

54. During the base year, respondent reported Business Getting and Maintaining expenses totalling $5,862 (Fig. 2, line 8). All of this amount was attributable to market support losses. Complainant deducted all of the Business Getting and Maintaining expenses, but added an allowance for this category of expense (Finding 59, *infra*).

55. Subtracting the foregoing deductions totalling $23,380 from respondent's total expenses of $60,906 results in Adjusted Expenses of $37,526 (Fig. 2, line 9), or 62% of respondent's total expenses.

56. During the base year, respondent received on consignment 17,901 head of livestock, or 17,224 animal units, consisting of 6,894 cattle, 9,840 calves, 983 hogs, 30 sheep or goats, and 154 horses or mules (CX 6). The number of animal units is used in computing various allowances referred to below.

57. Complainant added an allowance of $8,612 to compensate the owner-officers of respondent for services performed at the auction during the base year (Fig. 2, line 11; see Finding 4, *supra*).

58. Complainant added an allowance of $1,077 for Owner's Management (see Finding 5, *supra*) and $215 for Interest on Working Capital (see Finding 6, *supra*), totalling $1,292 (Fig. 2, line 12).

59. Complainant added an allowance of $4,306 for respondent's Business Getting and Maintaining expenses during the base year (Fig. 2, line 14). This allowance was the maximum permitted under complainant's policy, *i.e.*, 25¢ per animal unit sold at auction during the base

year (see Finding 8, *supra*). (Fig. 2, line 15; see Finding 7, *supra*).

60. Complainant added an allowance of $660 for bad debts (Fig. 2, line 15; see Finding 7, *supra*).

61. Complainant added an allowance of $1.033 for the stockyard's use of land during the base year (Fig. 2, line 16; see Finding 10, *supra*).

62. Complainant added an allowance of $2,754 for respondent's return on buildings, structures and equipment during the base year (Fig. 2, line 17; see Finding 9, *supra*). Respondent's annual report (CX 6, p. 2) shows original cost of buildings and equipment as $53,464.09 and accumulated depreciation of $25,922.37. The resulting book value shown is $27,922.37. This is a mathematical error. The correct book value ($53,464.09–$25,922.37) is $27,-541.72. Complainant's allowance is computed on the basis of 10% of the correct book value.

63. Complainant added an allowance of $6,890 for operating margin (Fig. 2, line 20; see Finding 11, *supra*).

64. Adding all of the allowances, which total $25,547, to respondent's Adjusted Expenses of $37,526, results in a Total Reasonable Revenue Requirement of $63,073 (Fig. 2, line 21).

65. Respondent's total revenue derived from selling commissions and yardage during the base year was $58,062 (CX 6, p. 4), and it received other income of $801, or total income of $58,863 (Fig. 2, line 22).

66. Complainant determined that the revenue received by respondent during the base year of $58,863 (Fig. 2, line 22) was less than its Total Reasonable Revenue Requirement of $63,073 (Fig. 2, line 21) by $4,210 (Fig. 2, line 23).

67. Respondent's proposed Tariff No. 2 increased its rates and charges 1% on the gross sales price and 15¢ per head (yardage) on all livestock (CX 2). The gross value of livestock sold during the base year was $2,199,425. The 1% increase in charges applied to that amount would result in an increase in revenue of $21,994. The 17,901 head of livestock multiplied by the 15¢ increase in yardage would result in $2,685 additional revenue. The combination of these two amounts is $24,679. Adding $24,679 to respondent's total revenue of $58,863 would equal $83,542, which is $20,469, or 32% ($20,469 ÷ $63,073), more than the Total Reasonable Revenue Requirement. Moreover, respondent's reasonably anticipated livestock volume for 1976 is 28% higher than the base year 1974, which would tend to increase respondent's 1976 revenue by an additional 28%, if the value of livestock in 1976 remained the same as in the base year.

However, since the great bulk of respondent's revenue is derived from rates and charges which are based on the value of livestock sold, complainant cannot estimate with accuracy the total revenue or the revenue in excess of the Total Reasonable Revenue Requirement that will be generated by respondent's proposed tariff for any future period. But it can reasonably be predicted that respondent's total revenue in 1976 will substantially exceed its Total Reasonable Revenue Requirement.

68. Respondent's proposed Tariff No. 2 is and will be unjust, unreasonable and discriminatory.

69. Complainant's proposed schedule of rates and charges (CX 82) would, based on the reasonably anticipated volume of 22,117 animal units for 1976 (computed from CX 79), produce $63,811.40 (CX 79), which is slightly more than respondent's Total Reasonable Revenue Requirement. Complainant's proposed rates and charges are

just, reasonable and nondiscriminatory and are the rates and charges which respondent should assess and collect for its services and the use of its facilities.

IV. *Specific Finding As to Travis McGee.*

70. Respondent, Travis McGee, d/b/a Atkins Livestock Auction, is an individual with his place of business at Atkins, Arkansas. Respondent is, and at all times mentioned herein was: (a) engaged in the business of operating a posted stockyard under the Act; (b) engaged in the business of selling livestock on a commission basis at the stockyard and as a dealer buying and selling livestock in commerce; and (c) registered with the Secretary of Agriculture as a market agency to sell on commission and dealer to buy and sell livestock in commerce.

71. Complainant accepted for filing (without determining the reasonableness thereof) respondent's Tariff No. 1 effective April 18, 1972, as amended by Supplement No. 1 effective March 28, 1973. Supplement No. 1 pertains to special horse and mule sales only. On January 14, 1976, respondent filed proposed Tariff No. 2 to become effective February 1, 1976, which assessed increased rates and charges for his stockyard services. Complainant concluded, after an analysis of the annual report filed by respondent for the base year 1974, that the proposed rates and charges in Tariff No. 2 were unjust, unreasonable and discriminatory and suspended the operation of the tariff for 60 days.

72. The complainant's cost and revenue analysis based on respondent's annual report for the base year 1974, during which Tariff No. 1 was in effect, is shown in Figure 3, which follows. The individual items on Figure 3 are discussed *seriatim* in the following Findings of Fact.

Travis McCee
d/b/a Atkins Livestock Auction
Atkins, Arkansas

Cost and Revenue Analysis for Rate Purposes
(Base Period—Year 1974)

			Adjustments (*Removals*)		
1.	Expenses per Analysis				$66,978
2.	*LESS*: Vet. Medicine			$ 337	
3.	*LESS*: Business Getting & Maintaining Expenses				
4.		Advertising	$ 380		
5.		Market Support	25,887		
6.		TOTAL		$26,267	
7.	Adjusted Expenses ($66,978 less lines 2 & 6)				$40,374
			Adjustments (*Additions*)		
8.	Adjusted Expenses				$40,374
9.	*PLUS*: Compensation for Working Order		$ 8,677		
10.		Allowance for Owner's Management Interest on Working Capital	$ 1,302		
11.		Total Allowance for Owner		$ 9,979	
12.	*PLUS*: Allowance for Business Getting and Maintaining		$ 4,339		
13.		Allowance for Bad Debts	621		
14.		Allowance for Use of Land	1,041		
15.		Return on Buildings and Equipment	886		
16.		TOTAL		$ 6,887	
17.	(Lines 8 + 11 + 16)				$57,240
18.	*PLUS*: Allowance for Operating Margin			$ 6,942	
19.	Total Reasonable Revenue Requirement (Line 17 + 18)				$64,182
20.	Total Revenue per Annual Report				$65,497
21.	Current Revenue in Excess of Requirement (Line 20 minus 19)				$ 1,315

Figure — 3

73. Respondent's total claimed expenses in rendering stockyard services during the base year 1974, as shown by his annual report, are $66,978 (Fig. 3, line 1), including market support loss.

74. During the base year, respondent did not report any expenses for owner's salary, interest or bad debts. Allowances to compensate Mr. McGee as a working owner, for interest on working capital and for bad debts were added later (Findings 79, 80 and 82, *infra*).

75. During the base year, respondent paid $337 as "Vet. med." expense (Fig. 3, line 2). That expense was originally deducted by complainant on the ground that it should have been charged to those who purchased the supplies or service provided. However, at the hearing it was ascertained that the $337 was expended for the treatment of "caught cattle" (Tr. 531-533). Accordingly, that amount should have been included in the total Business Getting and Maintaining expenses. However, since respondent's total Business Getting and Maintaining expenses exceeded the maximum allowed by complainant (Findings 76 and 81, *infra*), the end result would not change. In any event, it was properly removed by complainant as a separate expense item, and Judge Palmer erred in allowing it as a separate expense item (Initial Decision, p. 36).

76. During the base year respondent reported Business Getting and Maintaining expenses totalling $26,267 (Fig. 3, line 6). Of this amount, $380 was expended for advertising designed to promote the interests of consignors (Fig. 3, line 4) and $25,887 was shown as market support loss (Fig. 3, line 5). Complainant deducted all of the Business Getting and Maintaining expenses (Fig. 3, line 6), but added an allowance for this category of expense (Finding 81, *infra*).

77. Subtracting the foregoing deductions totalling $26,604 from respondent's total expenses of $66,978 results in Adjusted Expenses of $40,374 (Fig. 3, line 7), or 60% of respondent's total expenses.

78. During the base year, respondent received on consignment 17,354 animal units, consisting of 17,354 head of cattle. This figure is used in computing various allowances referred to below.

79. Complainant added an allowance of $8,677 to compensate Mr. McGee as a "working" owner during the base year (Fig. 3, line 9; see Finding 4, *supra*). Mr. McGee's primary function at the weekly auction sale is to serve as "starter" (CX 7, p. 7). A starter sets the starting price or opening bid on consigned cattle when such cattle are placed in the auction ring and put up for sale.

80. Complainant added an allowance of $1,085 for Owner's Management (see Finding 5, *supra*) and $217 for Interest on Working Capital (see Finding 6, *supra*), totalling $1,302 (Fig. 3, line 10).

81. Complainant added an allowance of $4,339 (Fig. 3, line 12) for respondent's Business Getting and Maintaining expenses during the base year. This allowance was the maximum permitted under complainant's policy, *i.e.*, 25¢ per animal unit sold at auction during the base year (See Finding 8, *supra*).

82. Complainant added an allowance of $621 for bad debts (Fig. 3, line 13; see Finding 7 *supra*).

83. Complainant added an allowance of $1,041 for the stockyard's use of land during the base year (Fig 3, line 14; see Finding 10, *supra*).

84. Complainant added an allowance of $886 for respondent's return on buildings and equipment during the base year (Fig. 3, line 15; see Finding 9, *supra*).

85. Complainant added an allowance of $6,942 for operating margin (Fig. 3, line 18; see Finding 11, *supra*).

86. Adding all of the allowances, which total $23,808, to respondent's Adjusted Expenses of $40,374 results in a Total Reasonable Revenue Requirement of $64,182 (Fig. 3, line 19).

87. Respondent's total revenue derived from selling commissions and yardage during the base year was $65,497 (CX 7, p. 4). No other income items were reported.

88. Complainant determined that the revenue received by the respondent during the base year of $65,497 (Fig. 3, line 20) exceeded his Total Reasonable Revenue Requirement of $64,182 (Fig. 3, line 19) by $1,315 (Fig. 3, line 21), or 2% ($1,315 ÷ $64,182).

89. Respondent's proposed Tariff No. 2 increased his rates and charges 1% on the gross sales price and 15¢ per head (yardage) on all livestock (CX 3). The gross value of livestock sold during the base year was $2,071,601. The 1% increase in charges applied to that amount would result in an increase in revenue of $20,716. The 17,354 head of livestock multiplied by the 15¢ increase in yardage would result in $2,603 additional revenue. The combination of these two amounts is $23,319. The $23,319 plus the $1,315 excess revenue already generated under the prior tariff would produce a projected excess revenue of $24,634 based on the value and volume of livestock handled during the base year, or 38% more than the Total Reasonable Revenue Requirement ($24,634 ÷ $64,182). Moreover, respondent's reasonably anticipated livestock volume for 1976 is 17% higher than for the base year 1974, which would tend to increase his 1976 revenue by an additional 17%, if the value of livestock in 1976 remained the same as in the base year.

However, since the great bulk of respondent's revenue is derived from rates and charges which are based on the value of livestock sold, complainant cannot estimate with accuracy the total revenue or the revenue in excess of the Total Reasonable Revenue Requirement that will be generated by respondent's proposed tariff for any future period. But it can reasonably be predicted that respondent's total revenue in 1976 will substantially exceed his Total Reasonable Revenue Requirement.

90. Respondent's proposed Tariff No. 2 is and will be unjust, unreasonable and discriminatory.

91. Complainant's proposed schedule of rates and charges (CX 83) would, based on the reasonably anticipated volume of $20,247 animal units for 1976 (computed from CX 78), produce $64,607.80 (CX 78), which is slightly more than respondent's Total Reasonable Revenue Requirement. Complainant's proposed rates and charges are just, reasonable and nondiscriminatory and are the rates and charges which respondent should assess and collect for his services and the use of his facilities.

V. *Specific Findings As to Bill Rice and Lois Rice.*

92. Respondents Bill Rice and Lois Rice, d/b/a Cleburne County Livestock Auction Sale, are a partnership with a place of business at Heber Springs, Arkansas. Respondents are, and at all times mentioned herein were: (a) engaged in the business of operating a posted stockyard under the Act; (b) engaged in the business of selling livestock on a commission basis at the stockyard;[8] and (c)

8. Official records maintained in the Registrations, Bonds and Reports Branch of the Packers and Stockyards Administration, USDA, show the registration for respondents was amended July 2, 1975, to include operations as a dealer buying and selling livestock in commerce for their own account.

registered with the Secretary of Agriculture as a market agency to sell on commission.

93. Complainant accepted for filing (without determining the reasonableness thereof) respondents' Tariff No. 2 effective April 10, 1973. On January 15, 1976, respondents filed proposed Tariff No. 3 to become effective February 1, 1976, which assessed increased rates and charges for their stockyard services. Complainant concluded, after an analysis of the annual report filed by respondents for the base year 1974, that the proposed rates and charges in Tariff No. 3 were unreasonable and discriminatory, and suspended the operation of the tariff for 60 days.

94. The complainant's cost and revenue analysis based on respondent's annual report for the base year 1974, during which Tariff No. 2 was in effect, is shown in Figure 4, which follows. The individual items on Figure 4 are discussed *seriatim* in the following Findings of Fact.

			Adjustments (*Removals*)		
1.	Expenses per Analysis				$52,674
2.	*LESS*:	Interest	$ 2,843		
3.		Trucking and Hauling	12,595		
4.		Pasture Rent	1,000		
5.		Vet. & Medicine	940		
6.		Fertilizer	780		
7.		Feed	5,832		
8.		TOTAL		$23,990	
9.	*LESS*:	Business Getting & Maintaining Expenses			
10.		Advertising	$ 850		
11.		Market Support	*Not Shown*		
12.		TOTAL		$ 850	
13.	Adjusted Expenses ($52,674 less lines 8 & 12)				$27,834
			Adjustments (*Additions*)		
13.	Adjusted Expenses				$27,834
14.	*PLUS*:	Compensation for Working Owners	$ 7,691		
15.		Allowance for Owners' Management and Interest on Working Capital	1,154		
16.		Total Allowance for Owners		$ 8,845	
17.	*PLUS*:	Allowance for Business Getting and Maintaining	$ 850		
18.		Allowance for Bad Debts	477		
19.		Allowance for Use of Land	923		
20.		Return on Buildings and Equipment	9,438		
21.		TOTAL		$11,688	
22.		(Lines 13 + 16 + 21)			$48,367
23.	*PLUS*:	Allowance for Operating Margin		$ 6,152	
24.	Total Reasonable Revenue Requirement (Line 22 + 23)				$54,519
25.	Total Revenue per Annual Report				$36,097
26.	Current Revenue in Excess of Requirement (Line 25 minus 24)			minus	(—$18,422)

Figure — 4

95. Respondents' total claimed expenses in the rendition of stockyard services during the base year 1974, as shown by their annual report, were $52,674 (Fig. 4, line 1). This includes market support expenses that are not specifically itemized in the annual report (CX 8, p. 5). None of the market support cattle (which were owned by respondents) were charged commission and yardage at this market (Tr. 569). Respondents' dealer cattle were consigned to their auction market and no commission and yardage charges were assessed (Tr. 570). Some expenses in the auction annual report are attributable to the dealer account as well as to the market support livestock.

96. During the base year, respondents did not report any owners' salaries or bad debts. An allowance was added by complainant for both of these items (Findings 106 and 109, *infra*).

97. During the base year, respondents paid $2,843 in interest (Fig. 4, line 2) incurred on debt used for the construction of buildings and facilities (Tr. 570). This interest expense was removed by complainant on the ground that it should not be borne by the rate payers, but by the owner-partners. If such interest is not removed, the rate payers would be providing such funds more than once: (a) in the form of an allowance for return on buildings and equipment and (b) as an operating expense. An allowance for interest on working capital was later added (Finding 107, *infra*).

98. During the base year, respondents reported $11,878 in trucking expenses and $718 for hauling, for a total of $12,595 (Fig. 4, line 3). This expense was deducted by complainant. If the market operators hauled consignors' livestock, they should have charged them the total cost of providing the service and reported the income

received. No trucking income was reported. Any trucking expenses incurred by the owners' dealer or market support activities should be charged to that particular account. None of the dealer expenses should be paid by the auction sale consignors. Respondents did incur trucking expense for their dealer livestock (Tr. 571-572) and own the truck used for this purpose. The trucking expenses include repairs, tires, gas, oil, licenses, taxes, insurance and depreciation for the truck.

99. During the base year, respondents reported $1,000 for pasture rent (Fig. 4, line 4). However, respondents' auction market has approximately 80 acres of land. For personal reasons, respondents chose not to utilize this land for holding market support livestock (Tr. 567). Also, the rented land was utilized for dealer livestock as well as market support livestock. The consignors should not be expected to pay this unnecessary expense. Accordingly, the expense for pasture land was deducted by complainant. However, an allowance of $923 was added by complainant for the use of land (Finding 110, *infra*).

100. During the base year, respondents paid $940 for "Vet. and medicine" (Fig. 4, line 5). This amount was deducted by complainant because it should have been paid by those who purchased the medicines or received the services provided. Those consignors who did not receive either should not pay for any part of the cost. Some of this expense was attributable to the respondents' dealer activities (Tr. 572-573).

101. During the base year, respondents paid $780 for fertilizer (Fig. 4, line 6). This expense was deducted by the complainant because it is not a necessary expense in order to provide stockyard services at an auction market.

102. During the base year, respondents paid a feed expense of $5,832 (Fig. 4, line 7). This expense was removed by complainant because it should have been charged to owners whose livestock were fed. If this is not done, all consignors must pay a share of the cost regardless of the fact that they did not receive anything in return. Respondents did not report any income for feed and do not have a feed charge in their current tariff. Some of this expense was incurred by the respondents' dealer livestock (Tr. 573).

103. During the base year, respondents reported Business Getting and Maintaining expenses of $850 (Fig. 4, line 10). The total amount was for advertising. All of the Business Getting and Maintaining expenses totalling $850 were deducted by complainant (Fig. 4, line 12), but an equal amount was added as an allowance (Finding 108, *infra*).

104. Subtracting the foregoing deductions totalling $24,840 from respondents' total expenses of $52,674 results in Adjusted Expenses of $27,834 (Fig. 4, line 13), or 53% of respondents' total expenses.

105. During the base year, respondents sold through their auction 15,573 head of livestock, or 15,381 animal units, consisting of 9,551 cattle, 5,660 calves, 215 hogs, 65 sheep or goats and 82 horses or mules. Of the 15,381 animal units sold during the base year, 11,600 represented livestock consigned by others, and 3,781, or 25% (3,781 ÷ 15,381), represented respondents' own livestock (CX 8; Tr. 569-570). The total number of animal units (15,381) is used in computing various allowances referred to below.

106. Complainant added an allowance of $7,691 to compensate respondents as working owners during the base year (Fig. 4, line 14; see Finding 4, *supra*).

107. Complainant added an allowance of $962 for Owners' Management and $192 for Interest on Working Capital (see Findings 5 and 6, *supra*), totalling $1,154 (Fig. 4, line 15).

108. Complainant added an allowance of $850 for respondents' Business Getting and Maintaining expenses during the base period (Fig. 4, line 17; see Finding 8, *supra*), which is the actual amount shown on respondents' report. If additional items had been shown on the report which would have warranted the maximum allowance permitted under complainant's policy (See Finding 8, *supra*), the allowance would have been $3,845 (15,381 x 25¢), or $2,995 more than the $850 allowed.

109. Complainant added an allowance of $477 for bad debts during the base year (Fig. 4, line 18; Finding 7, *supra*). Respondents incorrectly reported the gross value of the livestock sold to be only $367,584.66 (CX 8, p. 1). The correct amount could not be determined even though a letter was written requesting the correct information (CXs 90 and 91), but the gross value was estimated by complainant to be $1,588,446 (CX 42). The bad debt allowance computed on the basis of respondents' erroneous value would have been only $110 ($367,584.66 x .0003).

110. Complainant added an allowance of $923 for the stockyard's use of land during the base year (Fig. 4, line 19; see Finding 10, *supra*).

111. Complainant added an allowance of $9,438 for respondents' return on buildings and equipment during the base year (Fig. 4, line 20; see Finding 9, *supra*).

112. Complainant added an allowance of $6,152 for operating margin (Fig. 4, line 23; see Finding 11, *supra*).

113. Adding all of the allowances, which total $26,685, to respondents' Adjusted Expenses of $27,834 results in a Total Reasonable Revenue Requirement of $54,519 (Fig. 4, line 24).

114. Respondents' total reported revenue derived from selling commissions and yardage during the base year was $36,097 (CX 8). This does not include income from commissions and yardage on respondents' dealer livestock that were sold at their auction market or respondents' market support livestock resold through their auction market (Tr. 569-570). If respondents had included the income from commissions and yardage on their own livestock sold through their auction,[9] they would have received an additional $11,759 income,[10] or total income of $47,856 ($36,097 + $11,759).

115. Complainant determined that the reported revenue received by the respondents during the base year of $36,097 (Fig. 4, line 25) was less than their Total Reasonable Revenue Requirement of $54,519 (Fig. 4, line 24) by $18,422 (Fig. 4, line 26). However, the total revenue received by respondents for rate purposes was $47,856 (Finding 114, *supra*), which is $6,663 less than their originally computed Total Reasonable Revenue Requirement ($54,519 – $47,856), and $2,152 less than the Total Reasonable Revenue Requirement of $50,008 which I have computed (Finding 116, *infra;* $50,008 – $47,856).

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9. An auction operator is not permitted a "free ride" at the expense of other consignors; i.e., technically he should pay himself a commission on his own consignments; but if he does not, for rate purposes, his income must be regarded as increased by the amount of the commissions due on his own livestock.

10. Respondents received $36,097 (Fig. 4, line 25) from 11,600 animal units (Finding 101, *supra*) consigned by others, or an average of $3.11 per animal unit ($36,097 ÷ 11,600). Hence they would have received about $11,759 from their own 3,781 animal units (Finding 105, *supra;* $3,781 x $3.11; *cf.* Tr. 351).

116. With respect to the following procedure followed by complainant, I do not believe that complainant's briefs fully or accurately explain what complainant did. Accordingly, I will set forth first what complainant's briefs say complainant did and then what I believe complainant did based on the evidence. Whichever version of what complainant did is correct, I disagree somewhat with both versions. I believe complainant's analysis was overly generous to respondents. Complainant's original brief states, pp. 106-107:

> 27. * * * Complainant determined that the current revenue received by the respondents during the base period was less than their reasonable revenue requirements by $18,422 (Figure 4, line 26), i.e., the difference between the respondents' total reasonable revenue requirements during the base period (Figure 4, line 24) and the respondents' total revenue received during the base period (Figure 4, line 25).
>
> Of the total animal units (15,381) *sold during the base period* [i.e., 1974], 3,781 animal units *or approximately 25 percent,* were consigned by the respondents to their auction sale (Tr. 422-424). Respondents did not charge any commission and yardage for these 3,781 units consisting of 3,241 head of cattle and 540 head of calves. The application of the 25 percent to the total reasonable revenue requirements of $54,519 results in an elimination of $13,630, leaving a balance of $40,889 as the reasonable revenue requirement (*Secretary of Agriculture* v. *H. L. Bowman, supra* at 432; Brinckmeyer, Tr. 422-424).
>
> 28. The complainant determined that the revenue received by the respondents during the base period, $36,097 (Figure 4, line 25), was less than their rea-

sonable revenue requirement of $40,889, Finding 27, *supra*, by $4,792.

29. The respondents' proposed tariff (CX 4) increased their rates and charges .7 percent on the gross sales price and 20 cents per head (yardage) on all livestock. The gross value of livestock sold during the base period was estimated at $1,588,446. The .7 percent increase in charges applied to that amount would result in an increase in revenue of $11,119 annually. The 15,573 head of livestock multiplied by the 20 cent increase in yardage results in $3,115 additional revenue. The combination of these two amounts is $14,234. The $14,234 less the $4,792 negative revenue generated under the prior tariff would produce a projected excess revenue of $9,442 based on the value and volume of livestock handled during the base period. [Emphasis supplied.]

Complainant's appeal brief states, pp. 36-37:

> When complainant analyzed the Rices' annual report [*i.e.*, for 1974] on the same basis as it analyzed the annual reports filed by the other respondents, it concluded that the costs reported included those arising out of their dealing activities and the income reported did not include charges for providing stockyard services for their dealer cattle. These conclusions were based on the review of several hundred analyses of annual reports as well as the analyses of the other respondents' annual reports in this proceeding. As explained by witnesses Brinkmeyer (Tr. 422-424) the reasonable revenue requirement was established by allocating the total cost of service between the dealer activity and the auction market operation based on the percentage of livestock handled by each (Complainant's Brief, Proposed Finding 27, pp. 106-107).

In another rate proceeding involving an auction market, *Secretary of Agriculture* v. *H. L. Bowman*, *supra*, at 425, this method of allocating expenses to the dealer activity on the basis of volume was approved when the respondent's records did not reflect all the expenses separately. In that proceeding, expenses that could be determined as chargeable to the dealer activities were completely removed, and the remaining joint expenses were allowed and disallowed in the proportion borne by the dealer consignments to total market consignments. This was precisely the procedure presently followed by complainant (Complainant's Brief, Proposed Finding 27, pp. 106-107). Perhaps an audit would permit the exclusion of more dealer expenses or a more precise ascertainment of market operating expenses as suggested by Judge Palmer but that would be problematical since Mrs. Rice admitted that the records were not kept in such a way as to permit their CPA to separate dealer and auction market expenses for the annual report (Tr. 568; Complainant's Brief, p. 106). The failure of the respondents to keep complete records is not a proper basis for refusing to set reasonable rates based on the incomplete data available from their annual reports. Their annual report data may be properly adjusted in accord with the informed experience of agency personnel relying upon their knowledge of auction markets handling similar volumes of livestock, especially those operated by two of the other respondents, Central Arkansas Livestock Sale, Inc. and Travis McGee.

In essence, complainant's briefs say that complainant reduced the Total Reasonable Revenue Requirement by 25% because 25% of respondents' total volume *in the*

base year 1974 consisted of their own livestock, on which no commissions or yardage were paid. Complainant's brief relies on *Secretary of Agriculture* v. *H. L. Bowman,* 1 Agr Dec 425, 432 (1942), which held that where an auction operator failed to keep records dividing expenses between his auction and dealer businesses, the expenses could be allocated on the basis of the relative volume of livestock handled in each category during the base period. Specifically, the Secretary stated (*ibid.*):

> 20. In explaining the profit and loss statement, the Government accountant testified that the only basis upon which a distribution of the expenses could be made between the trading and commission activities would be on the basis of volume. In other words, certain expenses, such as salaries, office supplies, social security taxes, etc., applicable to trading and consignment activities, should be distributed on a headage basis. Of the total volume of 15,566 head of livestock handled, 4,027 head, or 26 percent, were handled on a trading basis. The application of this percentage to the adjusted operating expenses of $19,358.22 results in an elimination of $5,033.13, leaving an operating expense of $14,325.08 applicable to the commission business of the respondent.

If complainant's briefs accurately explain what complainant did, complainant reduced the Total Reasonable Revenue Requirement by 25% rather than the adjusted expenses, as was done in the *Bowman* case.[11]

However, I do not believe that complainant's briefs are complete or accurate, in this respect; *i.e.*, I do not

11. The adjusted expenses reduced in *Bowman* included Business Getting and Maintaining expenses whereas respondents' adjusted expenses do not include that category of expenses

believe that complainant reduced the Total Reasonable Revenue Requirement by 25% merely because of the allocation problem involving respondents' own livestock handled in the base year *1974*, which would involve the *Bowman* doctrine. Jack W. Brinckmeyer, Chief of complainant's Rates Branch, testified (Tr. 422-424):

> A. The rate proposed for Heber Springs [*i.e.*, Bill and Lois Rice] shows a revenue that these proposed rates would produce less than what is shown on Complainant's Exhibit No. 42. Complainant's Exhibit No. 42 has a revenue requirement of * * * $54,519.
>
> Q. The rates that are shown on Complainant's Exhibit 80 would produce $40,509.10?
>
> A. That's what I estimated.
>
> Q. Why did you prepare a tabulation that produced this amount rather than the amount previously testified to?
>
> A. In again developing a reasonable rate, I felt that we had to make some adjustments in the revenue requirement for this market because we had a greater number of market-owned cattle consigned. The annual report shows the total consigned livestock to be 15,381 units [in 1974]. Those units consigned by the market is 25 percent of the total consignments. I reduced the $54,519 by 25 percent and developed a rate schedule that would produce rates in that area. It was my feeling that the 25 percent consigned by the market operator, the cost of those should be reduced from that $54,000 to come up with a revenue requirement since the head count *for 1975* reported to me was based on consigned livestock and not total receipts.

Q. The head count for livestock reported *for 1975* to you was the consigned by others than the market operators?

A. Right.

Q. *You made the adjustment to allow for the livestock sold through the market in '75 which had been consigned by the operators, dealer livestock, and which were not reported to you in the total number of livestock consigned through this market?*

A. I think that's right. What I did was, the 1974 report, I reduced the revenue requirement by 25 percent, because *the 1975* figures did not include the livestock consigned by the market operator.

Q. Is it your understanding that in prior years this market has not charged and collected a commission on livestock consigned to the market by market operators?

A. That's my understanding, yes.

Q. That is the basis for the adjustment?

A. That's right. [Emphasis added.]

Mr. Brinckmeyer's testimony shows that there is a very important reason for making a major adjustment in the rates that otherwise would have been prescribed irrespective of any problem as to the allocation of dealer expenses in the base year 1974. Specifically, respondents erroneously failed to include in their volume data for 1975, which underlies complainant's estimate of respondents' anticipated volume for 1976, respondents' own livestock, which, it may be inferred, was substantial. For example, in the base year 1974, respondents' own consignments were 25% of their total consignments. In 1971, 1972 and 1973, respondents' own consignments were 27.6%,

26.4% and 26.6%, respectively, of their total consignments (CXs 39-41). Hence the substantial understatement of respondents' volume figures *for 1975*, which presents a problem in addition to the problem of allocating respondents' *1974* base year expenses (as in *Bowman*), required complainant to make a major adjustment in respondents' proposed rates for 1976; and according to Mr. Brinckmeyer, the failure of the 1975 volume figures to include respondents' own livestock is the reason he reduced the Total Reasonable Revenue Requirement by 25%.

Assuming that the 25% adjustment was made because the 1975 volume figures did not reflect respondents' own livestock handled in 1975, to correct that error by respondents, I would increase the 1975 volume figures (and thereby the 1976 anticipated revenue), rather than reduce the Total Reasonable Revenue Requirement. This would more accurately reveal the true nature of, and reason for, the adjustment. Specifically, I would estimate that respondents' own livestock handled in 1975 was 25% of their total consignments for 1975, and, therefore, I would increase complainant's estimate as to the reasonably anticipated volume to be received in 1976 from 13,676 animal units (computed from CX 80) to 18,235[12] animal units.[13]

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12. Since 13,676 animal units are 3/4 of the total, you have to multiply 13,676 by 4/3 to get the total (13,676 x 4/3 = 18,235). Stated differently, 25% of 18,235 equals 4,339; and 18,235 less 4,559 equals 13,676.

13. This estimate of 18,235 animal units to be received by respondents in 1976, consisting of 25% of their own livestock, is not only consistent with respondents' prior history from 1971 to 1974, in which respondents' own livestock was 27.6%, 26.4%, 26.6% and 25%, respectively, of each year's total animal units, but it also makes respondents' projected 1976 volume increase (over the base year 1974) consistent with the corresponding projected increases for the other respondents. Specifically, the 1974 base year volumes and the projected 1976 volumes for the other respondents are: Major Lewis, 75,165 to 90,430, up 20%;

(Continued on following page)

This would correspondingly increase complainant's estimate of the revenue to be generated in 1976 from complainant's rate schedule from $40,509 (CX 80) to $54,012,[14] which is approximately the same as complainant's originally computed Total Reasonable Revenue Requirement of $54,519 (Fig. 4, line 24).

Moreover, a further adjustment is necessary because respondents' reported expenses in *1974* include dealer expenses, which must be removed from their auction expenses for rate purposes. Under the *Bowman* doctrine, the adjusted expenses of $27,834 could be reduced 25%, or $6,959. In fairness to respondents, however, perhaps three items in the adjusted expenses, totalling $9,789, should not be reduced, *viz.*, wages paid to auctioneer, scale test and depreciation (Finding 1, *supra*). Excluding those items from the 25% reduction would result in $4,511 reduction in the adjusted expenses ($27,834 – $9,789 = $18,045 x .25 = $4,511). Subtracting $4,511 from $54,519 leaves a Total Reasonable Revenue Requirement of $50,008. This is the Total Reasonable Revenue Requirement which I find is appropriate for respondents.

117. Respondents' proposed Tariff No. 3 increased their rates and charges .7% on the gross sales price and 20¢ per head (yardage) on all livestock (CX 4). The gross value of livestock sold during the base year was estimated at $1,588,446 (CX 42). The .7% increase in

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Footnote continued—

Central Arkansas, 17,224 to 22,117, up 28%; and Travis McGee, 17,354 to 20,247, up 17% (Findings 32, 44, 56, 69, 78 and 91, *supra*). The corresponding figures for Bill and Lois Rice under my estimate are 15,381 (Finding 105, *supra*) to 18,235, up 19%.

14. As in footnote 12, above, since $40,509 is 3/4 of the total, you have to multiply $40,509 by 4/3 to get the total ($40,509 x 4/3 = $54,012). Stated differently, 25% of $54,012 equals $13,503; and $54,012 less $13,503 equals $40,509.

charges applied to that amount would result in an increase in revenue of $11,119 annually. The 15,573 head of livestock sold during the base year multiplied by the 20¢ increase in yardage would result in $3,115 additional revenue. The combination of these two amounts is $14,234 (CX 42). The $14,234 less the $2,152 negative revenue generated under the prior tariff (Finding 115, *supra*) would produce a projected excess revenue of $12,082 based on the value and volume of livestock handled during the base year, or 24% ($12,082 ÷ $50,008) more than the Total Reasonable Revenue Requirement of $50,008 computed in Finding 116, *supra*. Moreover, respondents' reasonably anticipated livestock volume for 1976 is 19% higher than for the base year 1974 (Finding 116, *supra*, fn. 13), which would tend to increase respondents' 1976 revenue by an additional 19%, if the value of livestock in 1976 remained the same as in the base year 1974.

However, since the great bulk of respondents' revenue is derived from rates and charges which are based on the value of livestock sold, complainant cannot estimate with accuracy the total revenue or the revenue in excess of the Total Reasonable Revenue Requirement that will be generated by respondents' proposed tariff for any future period. But it can reasonably be predicted that respondents' total revenue in 1976 will substantially exceed their Total Reasonable Revenue Requirement.

118. Respondents' proposed Tariff No. 3 is and will be unjust, unreasonable and discriminatory.

119. Complainant's proposed schedule of rates and charges (CX 84) would, based on the reasonably anticipated volume of 18,235 animal units for 1976 (Finding 116, *supra*) produce $54,012 (Finding 116, *supra*), which is $4,004 more than the Total Reasonable Revenue Require-

ment of $50,008 (Finding 116, *supra*).[15] Complainant's proposed rates and charges are just, reasonable and nondiscriminatory and are the rates and charges which respondents should assess and collect for their services and the use of their facilities.[16]

120. Judge Palmer concluded that the evidence was not sufficient to determine the proper level of respondents' revenue requirement (Initial Decision, pp. 38-39). Judge Palmer relies, in part, on the fact that there was no appraisal of respondents' land. But such an appraisal is unnecessary since complainant's formula, which is approved in the Conclusions, *infra*, uses an allowance based on the number of animal units sold during the base year rather than the value of the land.

Judge Palmer also relies on respondents' failure to separate their dealer activities from their auction activities, which required complainant to make estimates and pragmatic adjustments. But I would not reward respondents' recordkeeping and reporting failures—which are violations of the Act—by permitting them to charge unjust, unreasonable and discriminatory rates for a year or two longer than the other respondents who kept adequate records and made accurate reports.

Ratemaking is not an exact science. Complainant's estimates and adjustments are reasonable. They are of the

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15. Ordinarily, I would reduce complainant's proposed rates so that respondents' anticipated revenue would not exceed their Total Reasonable Revenue Requirement by such a large amount. But in view of all of the circumstances of this case, including Judge Palmer's view that the evidence is insufficient to prescribe respondents' rates, I believe it is prudent to have a larger than usual margin for error (see Finding 120, *infra*).

16. I do not share respondents' fear (Tr. 564) that they could not compete if their rates were higher than neighboring markets (see, *e.g.*, RX1, pp. 11-12, 37-38).

type frequently made in ratemaking proceedings. See, *e.g., In re H. L. Bowman, supra,* 1 Agr Dec. 425, 432 (1942); and *Southern Louisiana Area Rate Cases* v. *Federal Pow. Com'n,* 428 F.2d 407, 422-423 (C.A. 5), certiorari denied, 400 U.S. 950, in which the Court referred to the "inherent, unavoidable approximate nature of rate regulation" (428 F.2d at 423).

Moreover, there is ample margin for error in complainant's proposed rates. Complainant's proposed rates would likely produce in 1976 $4,004 more than respondents' Total Reasonable Revenue Requirement (Finding 119, *supra*). This, added to the operating margin of $6,152, provides a margin for error of $10,156. Even if I had made no adjustment because of respondents' failure to separate their dealer and auction expenses in the base year 1974, that would have added only $4,511 to the Total Reasonable Revenue Requirement (see Finding 116, *supra*). And even if respondents could have shown that their market support or other business getting expenses entitled them to the maximum allowance for business getting and maintaining expenses, that would have added only $2,995 (Finding 108, *supra*). Those two items, which are the two major items where a reasonable possibility exists that better records might have produced different results, total $7,506 ($4,511 + $2,995). Subtracting that total, $7,506, from the $10,156 margin for error would still leave a $2,650 margin for error ($10,156 – $7,506). In other words, if both of those items were resolved 100% in respondents' favor, complainant's rates would still produce $2,650 more than the Total Reasonable Revenue Requirement. In the circumstances, I believe that it is unjust and unreasonable to the rate payers to delay their relief from respondents' exorbitant and discriminatory charges for an additional year or two.

CONCLUSIONS OF LAW

The Packers and Stockyards Act requires that all 2 rates or charges made by a stockyard owner or operator be "just, reasonable, and nondiscriminatory" (7 U.S.C. 206). There is no judicial decision involving an auction stockyard interpreting or applying that broad statutory standard. However, on March 26, 1976, the Judicial Officer interpreted and applied that phrase in an auction market rate case, and upheld the complainant's present auction market rate policy. *In re Giles Lowery Stockyards*, 35 Agr Dec 267 (1976). In that case, it was stated (35 Agr Dec at 282):

> The three administrative proceedings[3] involving rates and charges at auction stockyards were decided more than 30 years ago, during which time there have been major changes in ratemaking principles. Hence, for all practical purposes, this is a case of first impression which will serve as a guide for the Department's rate policy involving about 2,000 auction stockyards. Accordingly, the case warrants an extensive discussion of the numerous issues raised on appeal.

Unfortunately, Judge Palmer did not follow the principles enunciated in *Giles Lowery*. He stated (Initial Decision, pp. 62, 78-79):

> Inasmuch as *In re Giles Lowery* is presently on appeal, findings on P&SA's present ratemaking concepts and approach are being made independently of the *Lowery* decision * * *.
>
> * * *

3. *Secretary of Agriculture* v. *Norfolk Horse and Mule Commission Sales Company*, 1 Agriculture Decisions 372 (1942); *Secretary of Agriculture* v. *H. L. Bowman*, 1 Agriculture Decisions 425 (1942); *In re Foust-Yarnell Stock Yards*, 4 Agriculture Decisions 826 (1943) [Footnote in original.]

In reaching our conclusions we have not built upon those contained in *Giles Lowery Stockyards*, presently on appeal, but have strictly based them upon the record evidence before us in light of applicable law and policy expressed prior to the *Lowery* decision. That is not to say these conclusions are incompatible with those contained in *Lowery;* they are not. But the issues differ in such material respects that to forge links between the policy considerations expressed in *Lowery* and the problems presently before us would have attenuated rather than augmented this decision.

The principal difference is that in *Lowery*, P&SA utilized formulated allowances in support of evidence obtained through audit and through the testimony of experts on property values. Therefore, the allowances were then considered wholly in terms of the probative weight they added to complainant's position, and not as has been urged here, as evidentiary substitutes. In addition, with the possible exception of respondents Bill and Lois Rice, the differences between revenue determinations based on the filed reports and on the P&SA series of allowances have been so insignificant as to make it clear that complainant's real goal is the establishment of simplified procedure for use as a matter of rote in future proceedings. In the context of proceedings such as these, this is an unobtainable goal.

I disagree completely with Judge Palmer's approach and analysis. The fact that *Giles Lowery* is on appeal is irrelevant. It sets forth the Department's policy, which is binding on the Department's Administrative Law Judges. *In re J. Acevedo & Sons*, 34 Agr Dec 120, 143-144 (1975), affirmed *sub nom. J. Acevedo & Sons* v. *United States*, 524 F.2d 977 (C.A. 5). *Giles Lowery* sets forth the guiding

principles to be followed by the Department's Administrative Law Judges irrespective of the outcome of the appeal in *Giles Lowery*, unless the case is reversed by the Supreme Court.[17]

Moreover, I disagree with Judge Palmer's view that *Giles Lowery* is distinguishable. The cases are virtually identical. Accordingly, much of this decision is "lifted" from *Giles Lowery* (*i.e.*, the actual typed pages from *Giles Lowery* are used herein), generally without specifically identifying *Giles Lowery* as the source.

I. *Rate Regulation Is Authorized by the Act and Is in the Public Interest.*

Respondents contend that in view of the great number of auction markets now in existence, there is no authority or justification for rate regulation of auction markets.

To be sure, there have been great changes in the livestock industry since the Act was enacted in 1921.[18] When the Act was passed, most livestock moved by railroad. Hence the few terminal stockyards in the United States, which were located at rail centers, had virtually monopolistic positions.[19] It was such terminal stockyards that the Court referred to in 1922 as the "great stockyards" which "are but a throat through which the current [of livestock] flows" (*Stafford* v. *Wallace*, 258 U.S. 495, 497, 514, 516).

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17. An adverse Court of Appeals decision would, of course, be followed in the States comprising its circuit.

18. See Engelman, *Trends in Livestock Marketing Before and After the Consent Decree of 1920 and the Packers and Stockyards Act of 1921*, Statement to the Subcommittee on SBA-SBIC Legislation, House Small Business Committee (P&SA, U.S.D.A., June 23, 1975).

19. It was estimated in 1921 that there were only 30 to 50 stockyards in the entire country which would be regulated by the Act at that time (H. Rep. No. 77, 67th Cong., 1st Sess., p. 10).

Since auction stockyards were "practically nonexistent in 1920,"[20] the Congressional Committee was referring to terminal stockyards when it said in 1920 and 1921 in the legislative history of the Act (Sen. Rep. No. 429, 66th Cong., 2d Sess., p. 3; Sen. Rep. No. 39, 67th Cong., 1st Sess., p. 7):

> The enactment of this bill is recommended upon the ground that the great public markets in which is handled the livestock that supplies the demand for the American consumption of 19,000,000,000 pounds of meat and meat products annually are public utilities and that as such they should be subject to supervision * * *.

With the improvement of roads and trucks, livestock no longer was limited to rail movement, and the auction industry developed rapidly. By 1949, there were almost 2,500 auction stockyards in the United States.[21] Many of these stockyards were too small to meet the regulatory criterion set forth in the Act, which stated that the Act did not apply to stockyards "of which the area normally available for handling livestock, exclusive of runs, alleys, or passageways, is less than twenty thousand square feet" (7 U.S.C. 202(a)). In 1958, following extensive hearings, Congress determined that it was in the public interest to extend the regulatory provisions of the Act to all of the auction stockyards in commerce, including those which were too small to meet the 20,000 square foot limitation. The legislative history of the 1958 amendments states (Sen. Rep. No. 1048, 85th Cong., 1st Sess., pp. 3-4):

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20. Williams and Stout, *Economics of the Livestock-Meat Industry* (1964), p. 232. See, also, Fowler, *The Marketing of Livestock and Meat* (1961), p. 255.

21. Packers and Stockyards Resume, Vol. XIII, No. 7 (P&SA, U.S.D.A., December 19, 1975), p. 34.

Livestock markets

When this act was passed in 1921, there was relatively few livestock markets and these were located primarily in large terminals. Most of the interstate movement of livestock was by railroad. In the early years of operation under the act all of the eligible markets were posted and the record shows that until 1930 these averaged less than 80 for the entire United States.

As transportation facilities—particularly roads and trucks—improved, railroads ceased to be an important limiting factor on livestock movement and the character of livestock marketing began to change. More auction markets developed: In 1930 there were 73 posted stockyards; by March 18, 1957, this number had increased to 439 and the Department of Agriculture estimates that there are at least an additional 500 stockyards still unposted which are eligible for posting (engaged in interstate commerce and with an area of 20,000 square feet or more).

More important, there have developed throughout the country an additional 1,400 or 1,500 country auctions and livestock markets which are engaged in interstate commerce but which are not under the jurisdiction of the Packers and Stockyards Act because of the size limitations in the act. Although these markets are technically under the jurisdiction of the Federal Trade Commission, there has been no effort by the FTC to regulate trade practices on these markets.

Equally significant is the growth which has taken place in country buying—buying by packers or by livestock dealers direct from the producer, without the animals going through a public stockyard or market. There was little or no such buying at the time

the Packers and Stockyards Act became law but it is today a common practice in almost every part of the country and more than 40 percent of all livestock sold moves in this manner. The Department of Agriculture has no jurisdiction over this country buying except that which is done by buyers for packers.

* * *

CHANGES MADE BY THIS BILL

From the foregoing it is obvious that the area in which the Packers and Stockyards Act is designed to operate has changed so substantially since 1921 that the Secretary of Agriculture is today charged by the act with responsibility over businesses and operations which could never have been intended by the framers of the legislation and is, on the other hand, powerless to take any action in some matters which have become an important and vital part of the livestock and meat packing industry. The bill reported herewith is a committee bill, drafted by the committee following extensive hearings on this matter. It is designed to amend the Packers and Stockyards Act so as to make it once again an effective instrumentality for the regulation of the livestock and meatpacking industry and for the protection of both producers and consumers. Specific changes are made in the act to meet the problems outlined above. These changes are:

* * *

(5) The Secretary of Agriculture is given jurisdiction over all livestock marketing involved in interstate commerce including country buying of livestock and auction markets, regardless of size.

Notwithstanding the drastic changes in livestock marketing since 1921, and the competition now afforded by some 2,000 auction stockyards, I believe that it is still in the public interest to regulate stockyard rates. Based on discussions with leading livestock marketing experts throughout the United States from December 1962 to January 1971, during which time I was administrator of the Packers and Stockyards Act regulatory program, I believe that stockyard rates would double in the absence of rate regulation, thereby substantially increasing marketing costs, to the detriment of producers and consumers. But neither respondents' view nor my view in this respect is of any consequence since Congress decided in 1921 that it is in the public interest to regulate stockyard rates, and reaffirmed and extended that decision in 1958. Only Congress can alter that decision.

Respondents' argument that auction markets are not "natural monopolies" should be addressed to Congress—not here. Congress' power to regulate commerce is broad enough to authorize the rate provisions of the Act, as applied to respondents.

II. *Ratemaking Principles Applicable to Auction Stockyards.*

Here, as in *Giles Lowery*, respondents challenge the Department's entire procedure for determining rates at auction stockyards because the Department does not follow the traditional public utility ratemaking procedure, which consists of determining a utility's rate base and the reasonable rate of return which the utility owners are entitled to earn on the rate base, after allowance for reasonable operating expenses, depreciation and taxes. The Department follows that traditional public utility ratemaking procedure for terminal stockyards, but not for auction

stockyards, in view of the great differences between terminal stockyards and auction stockyards.

The owners of a terminal stockyard provide the land, buildings and facilities where livestock are bought and sold. The selling function is performed by independent market agencies which sell livestock by private treaty in pens and office space assigned by the stockyard company. The owners of large terminal stockyards invest millions of dollars in the stockyards. For example, the rate base for the St. Paul terminal stockyard was $5.1 million (*In re St. Paul Union Stockyards Company*, 21 Agr Dec. 1216, 1315 (1962)). The terminal stockyard owners' entire income depends on the return allowed on their investment in the stockyard. From the standpoint of the source of their income, terminal stockyard owners are analogous to the owners of railroads, electric companies and other large public utilities. Accordingly, the Department follows the traditional ratemaking procedure of establishing a rate base for the terminal stockyards and a rate of return which the owners are entitled to earn on the rate base, after allowance for reasonable operating expenses, depreciation and taxes.

On the other hand, the investment in an auction stockyard is generally less than $50,000, or only 1% or 2% of the investment in the large terminal stockyards. The great majority of the auction market owners actively work at their auction markets, and a large part of their stockyard income comes from the allowance computed by the Department for a working owner. From the standpoint of the source of their income, working auction owners are analogous to owner-operators of individual taxicabs. Since respondents all have working owners, the ratemaking principles set forth herein (and in *Giles Lowery*) apply only to auction stockyards with working own-

ers. There is no need (and it would not be appropriate) to consider whether any different ratemaking principles would apply to the relatively few auction markets in the country which do not have working owners.[22]

In *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 49, involving a $3.7 million terminal stockyard (298 U.S. at 55), the Court stated (298 U.S. at 49):

> The question is not one of fixing a reasonable charge for a mere personal service subject to regulation under the commerce power, as in the case of market agencies [at a terminal stockyard] employing but little capital. * * * Here, a large capital investment is involved and the main issue is as to the alleged confiscation of that investment.

Auction market owner-operators resemble market agencies at a terminal stockyard (where a large part of their income results from "personal service") more nearly than they resemble owners of a terminal stockyard (where 100% of their stockyard income comes from the return on their investment). This "personal service" aspect of auction market owner-operators compels the use of ratemaking principles quite different from those used generally in public utility ratemaking proceedings.

Another significant difference between terminal stockyards and auction stockyards is that there has never been a problem in this country of two competing terminal stockyards being built in the same city or within a few miles of each other. Hence there has never been a problem resulting from the construction of too many terminal stock-

22. This should not be construed as an indirect suggestion that different principles would apply—but simply as an expression of the fact that no consideration is being given in this case to the question of rates at an auction market where the owner does not work at the market.

yards.[23] On the other hand, there have been serious problems in some areas of the country resulting from the construction of too many auction stockyards. It is not unusual in some areas to have two auction stockyards in the same town, and perhaps six or eight auction stockyards, or more, within less than an hour's drive away.[24]

It is important to note that anyone is free to build a stockyard wherever or whenever he pleases. No franchise or certificate of public convenience and necessity is required (see 9 CFR 203.8(e)). The Secretary is required to "post" every stockyard which is built irrespective of whether or not it is needed (7 U.S.C. 202), and to register every "market agency" who chooses to operate an auction stockyard (7 U.S.C. 201, 203). (Similarly, no governmental permission to cease operating a stockyard is required.)

In *Giles Lowery,* reference was made to a study published by Texas A.&M. University in 1966, which concluded that "from the standpoint of operational efficiency, there are too many auctions in operation in Texas" (CX 73, p. 3).[25] Specifically, the study concluded that 37% of

23. However, as the livestock industry has changed over the years, about half the terminal stockyards in operation in 1922 have ceased operation (*e.g.*, Chicago) or converted to an auction market (*e.g.*, Denver). See *Packers and Stockyards Resume,* Vol. XIII, No. 7 (P&SA, U.S.D.A., December 19, 1975), p. 34.

24. For example, in a recent Packers and Stockyards Act case which I decided, *In re Overland Stockyards, Inc.*, 34 Agr Dec 1808 (decided December 23, 1975), the record shows that there were two auction stockyards located in the same town, and five other auction stockyards within 25 miles.

25. The Texas A. & M. study is authored by Charley V. Wootan, Associate Executive Officer, Texas Transportation Institute, and John G. McNeely Professor, Department of Agricultural Economics and Sociology, Texas A. & M. University. It is titled: *Factors Affecting Auction Market Operating Costs* (B-1056, October 1966). It is included as an exhibit in the present record (CX 73).

all Texas auction markets were submarginal or marginal in efficiency because of the small volume of livestock they handled (*id.* at p. 2). The study concluded that the "prospect of auctions solving the efficiency problems of small markets through general increases in volume do not appear bright" (*ibid.*). The study explained why speculative capital has been available to invest in auction markets even in fringe areas of potential profitability as follows (*id.* at pp. 11-12):

> One of the primary determinants of whether a livestock market will be located in a town or community is pressure from local business and community leaders. In smaller communities particularly, an auction is considered to have an economic influence well beyond its contribution to the general sales base.
>
> An auction market draws business to a community. Receipts from the sale of livestock are often banked and spent in the community where the auction is located. A multiplier effect from the primary source of income results in continued transfer of money within a community, giving a greater impact upon the economic activity than just the initial amount of money introduced into the community.
>
> This anticipation of economic side benefits has caused many auctions to be started in areas already adequately served by facilities in nearby communities. Also it probably has been responsible for auctions being established in areas that do not have potential marketing volumes to support adequately a market of efficient size.
>
> There appears to be adequate speculative capital available to establish markets in even the fringe areas of potential profitability. Many of these markets must be refinanced one or more times as the original owners find they cannot be operated profitably. The ready availability of both capital and potential auction operators has kept the number of markets fairly constant during the past several years, even though many locations have proven unprofitable.

The problem of high unit costs and inefficiency because of too many auction stockyards is not, of course, limited to Texas. See Williams and Stout, *Economics of the Livestock-Meat Industry* (1964), p. 254; Fowler, *The Marketing of Livestock and Meat* (1961), p. 298; *Marketing Slaughter Cows and Calves in the Northeast: Present System-Alternatives for Improvement,* Preliminary Report 14, FCS, USDA (1976), pp. 12-17, 22.

Obviously, it is not in the public interest to have too many stockyards in an area. As stated in the Texas A. & M. study referred to above (*id.* at pp. 3, 5):

> The continuing large number of high cost, inefficient small-volume firms is evidence of considerable overinvestment in livestock auction markets. This overinvestment in plant, equipment, labor and associated marketing expenses results in a much higher social cost of auction operations than would exist with fewer firms having higher volumes and lower unit costs.
>
> * * *
>
> Overcapacity and its resulting inefficiencies are important to the public in general as well as to the operators of the markets and to livestock producers who use those facilities. * * *
>
> * * *
>
> He [*i.e.*, the livestock producer] may be subject to indirect losses though, that are less noticeable but

potentially greater in size [than from higher marketing charges]. These occur when either excessively small market size or high unit costs restrict the auction in its market performance.

Unnecessary marketing expense resulting from too many stockyards injures producers and consumers[26] since "[e]xpenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer" (*Stafford* v. *Wallace*, 258 U.S. 495, 515).[27]

In these circumstances, livestock sellers and consumers should not be burdened with stockyard rates sufficiently high to insure that *every* auction market owner will be able to pay all of his reasonable expenses and make a reasonable return on his rate base. The cases holding that it is a confiscation of property in violation of the due process clause of the Fifth Amendment to the Constitution

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26. Judge Palmer concluded that the effect of auction rates and charges on beef prices is insignificant because the principal purchasers of cattle and calves at auction markets are farmers seeking replacement or feeder animals (Initial Decision, pp. 15-16, 40). He overlooks the fact that increased marketing costs as to such animals might affect the price paid months later by packers purchasing fed cattle away from auction markets. But even if farmers could not (months later) pass on unreasonably auction market costs, it is not in the public interest to permit unreasonable marketing costs to increase the spread between the prices received by farmers and the prices paid by consumers.

27. Another problem resulting from too many stockyards in an area is that the auction owners, in an effort to maintain adequate volume to attract buyers, may engage in extensive dealer operations to personally bring sufficient livestock to the market to attract buyers. Where a number of auction owners in the same area are engaging in this practice, it may result in the same animals moving through several auction markets during a period of a few days, which results, of course, in undue stress to the animals and unnecessary marketing expenses. In addition the unnecessary proliferation of auction markets requires an increased number of buyers to cover the increased number of markets, which adds further unnecessary marketing expenses.

to establish a stockyard rate that does not yield a reasonable return on the owners' rate base, after reasonable expenses, involve terminal stockyards (*Denver Stock Yard Co.* v. *United States*, 304 U.S. 470, 475; *St. Joseph Stockyards Co.* v. *United States*, 298 U.S. 38, 49). The holdings in those terminal stockyard cases should not be extended to auction stockyards as to which the facts and public interest are essentially different.[28]

In view of the significant differences between auction stockyards and other public utilities, including terminal stockyards, the rate base-rate of return procedure followed as to other public utilities is not appropriate for use (except in a very limited respect, discussed below, relating to the allowance for buildings and equipment) in auction stockyard rate proceedings. Accordingly, it is not appropriate in an auction stockyard rate proceeding to determine by the use of a rate base and rate of return formula whether the permitted rates confiscate property in violation of the due process clause of the Fifth Amendment to the Constitution.

But even in those public utility proceedings where it is appropriate to determine whether the rates are confiscatory because a reasonable return, after expenses, is not allowed on the rate base, it is recognized that the rights of the public must be considered. And, in particular circumstances (*e.g.*, where there is lack of adequate

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28. Although complainant has not attempted to set rates for any of the respondents at a level which would force any of them out of business because of inefficient volume, in case of a change in complainant's position in the future, it is important to recognize that complainant is not required to fix non-confiscatory rates for every auction market. Moreover, since a large portion of an auction stockyard owner's return is based on personal service, and the return on his investment is only a small fraction of his total return from the stockyard, the respondents' reliance on cases involving traditional ratemaking principles is misplaced.

volume), the public interest requires and justifies the fixing of public utility rates that are not as high as would ordinarily be fixed under the customary ratemaking principles.

> It cannot, however, be laid down as an absolute rule, that in every case, a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable, because this may be the result of wasteful or extravagant management; the construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; or the road may have been unwisely built in localities where there is not sufficient business to sustain a road. Likewise, if by reason of its ill-advised contracts with other carriers rates fairly equivalent to the value of the services rendered fail to yield a fair return, the carrier must bear the loss. It is well established, therefore, that a corporate carrier cannot, as of right, and without reference to the interests of the public, realize a given percent on its capital stock, since stockholders are not the only persons whose rights or interests are to be considered (footnotes omitted).[29]

> [R]ates are not necessarily confiscatory although they do not pay a reasonable return on the investment, since the plant may have been constructed on too large a scale.[30]

> The interest both of the public and of the utility should be considered, but it is not always possible to

29. 64 Am Jur 2d, Public Utilities, § 217, p. 724.

30. 64 Am Jur 2d, Public Utilities, § 191, p. 796.

> do full justice to both, and where this is the case, the rights of the public must prevail.[31]

The applicable rule was stated in a concurring opinion by Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy in *Federal Power Commission* v. *National Gas Pipeline Company*, 315 U.S. 575, 607-608, as follows:

> The consumer interest cannot be disregarded in determining what is a "just and reasonable" rate. Conceivably, a return to the company of the cost of the service might not be "just and reasonable" to the public. The correct principle was announced by this Court in *Covington & Lexington Turnpike Co.* v. *Sandford*, 164 U.S. 578, 596: "It cannot be said that a corporation is entitled, as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishing of new lines of transportation should cause a diminution in the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use its property.

31. 64 Am Jur 2d, Public Utilities, § 191, p. 705.

The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends."[32] Cf. *Chicago & Grand Trunk Ry. Co.* v. *Wellman,* 143 U.S. 339, 345-346; *United Gas Co.* v. *Texas,* 303 U.S. 123, 150-151.

Accordingly, even if the validity of auction market rates were to be tested by whether they provide a reasonable rate of return on the applicable rate base, after reasonable expenses, there is no basis for respondents' contention that every auction market owner is entitled to a reasonable return on his rate base, irrespective of whether the market handles an adequate volume of livestock.

Considering all of the facts and circumstances relating to the livestock industry, I held in *Giles Lowery* (35 Agr Dec at 288-289) that *with respect to auction stockyards* the due process clause of the Fifth Amendment to the Constitution requires rates that produce sufficient revenue to enable a prudently managed auction stockyard to remain in business only if (i) the auction stockyard handles a sufficient volume of livestock to be a reasonably efficient livestock market;[33] and (ii) the investment in the auction

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32. *The Covington & Lexington Turnpike* decision quoted from above continues (164 U.S. at 597): "If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public."

33. The study published by Texas A. & M. University, referred to above, considered markets handling 15,000 animal units "inefficient" and "submarginal," and markets handling less than 25,000 animal units "at a disadvantage from the standpoint of efficiency and * * * only marginal" (CX 73, p. 2; see, also, CX 72, pp. 86-99, 103-104, in which it is stated that a "30,000-unit market is recommended as a minimum reasonable size" (*id.* at 104)). "Auctions handling 20,000 to 30,000 animal units are on the borderline [of efficiency]" (*Marketing Slaughter Cows and Calves*

(Continued on following page)

stockyard was prudent (*i.e.*, see the quoted material referenced by footnotes 29 and 30 above). (Under this standard, which does not guarantee the survival of inefficient markets, the Department could, if it desired, determine just and reasonable rates on an area basis, based on investment and expense data determined to be prudent and reasonable.)

Where the criteria in the preceding paragraph are met, the complainant discharges its duty to an auction stockyard owner and treats the ratepayers fairly where the rates are set at the lowest level that will provide revenue sufficient for (i) all of the market's operating expenses prudently and economically incurred; (ii) an annual charge for depreciation based on the expected life of the stockyard; (iii) taxes imposed on the stockyard; (iv) interest on debt prudently incurred; and (v) a reasonable return to the owner for his prudent investment and personal services (considering as a unit all of the income received from the stockyard, including allowances for a working owner, owner's management, interest on working capital, return on buildings and equipment, use of land, and that portion of the operating margin which is reasonably expected to be available for the owner's personal use at the time).[34] *Cf. In re St. Paul Union Stockyards Company,* 21 Agr Dec 1216, 1291 (1962); *Federal Power Commission*

Footnote continued—

in the Northeast: *Present System-Alternatives for Improvement,* Preliminary Report 14, FCS, USDA (1976), p. 14). However, complainant has not attempted to implement the holding in *Giles Lowery* that auction rates may lawfully be set at a level which would enable only stockyards handling sufficient volume to be reasonably efficient to survive.

34. The omission of "ability to attract capital" is deliberate since, as shown above, a major problem in the livestock auction industry is that too much capital is attracted, even to marginal markets.

v. *Hope Gas Co.*, 320 U.S. 591, 605; 64 Am Jur 2d, Public Utilities, § 135.

One reason why small, inefficient auction markets continue to operate is that they "provide operators with their best employment opportunity" (*Marketing Slaughter Cows and Calves in the Northeast: Present System-Alternatives for Improvement*, Preliminary Report 14, FCS, USDA (1976), p. 22). Complainant's rate policy, which is based on a market's actual expected volume rather than an efficient volume, encourages small, inefficient markets to continue to operate.

However, if the criteria set forth above were followed in setting auction market rates, they would be constructed on the basis of the receipt by the market of at least 30,000 animal units. Under this principle, *e.g.*, the rates constructed by complainant for Travis McGee, whose anticipated volume for 1976 is only 20,247 animal units (Finding 91, *supra*), would be reduced by about one-third. Over a period of time, such a policy would, of course, drive the small, inefficient auctions out of business. I believe that would be in the public interest, and such a policy should be implemented (perhaps over a period of time). But that is a major "political" type of decision that should not be made by a career official such as the Department's Judicial Officer. Accordingly, I will acquiesce in the setting of rates which I belive are unreasonably high.

III. *Base Period and Anticipated Volume.*

The complainant's rate analysis is based on its analysis of the respondents' annual reports for calendar year 1974, which contained the latest figures then available. In the event of litigation, it is not practical to keep updating the relevant cost data. *In re Giles Lowery*, 35 Agr Dec 267, 292-294 (1976), appeal pending. In the case of *In re St.*

Paul Union Stockyards Co., 21 Agr Dec 1216, 1225 (1962), a "cut-off" date of October 31, 1967, was established because it was found "impracticable to keep revising the evidence adduced so as to have it current as of the conclusion of the proceeding." The case was decided five years later. The Judicial Officer stated in that case (21 Agr Dec at 1225):

> It was recognized, of course, that the record would not be wholly reflective of current conditions at the time of the issuance of the final order in the proceeding, but it was believed desirable to obtain a resolution of the sharp conflict between the parties as to the basic concepts and principles which should govern the determination of such matters as (1) the property of respondent that should be considered used and useful for the rendition of stockyard services and included in the rate base, (2) the valuation of such property and the allowance for working capital upon which respondent is entitled to earn a fair return, (3) the rate of return respondent is entitled to earn, (4) the amounts allowable for repairs and depreciation, and (5) other expenses allowable in the furnishing of stockyard services.

No challenge is made by respondents as to the use of the calendar year 1974 as the base period (see Respondents' Brief, p. 26).

After complainant determined that respondents' proposed increases were unjust, unreasonable and discriminatory, complainant constructed a tariff to produce reasonable rates based on complainant's estimate of the volume to be received by each respondent in calendar year 1976. Here, again, complainant was using the most recent data then available. It is practical and easy to use the most recent volume data, and it is necessary and appro-

priate to use the most recent volume data because ratemaking looks to the future. Ratemaking is "largely an exercise in prophecy." *United States* v. *Morgan*, 313 U.S. 409, 415. "[R]atemakers must be prophets of the future as well as historians of the past" (*Williams* v. *Washington Metropolitan Area Transit Com'n*, 415 F.2d 922, 928 (C.A. D.C.), certiorari denied, 393 U.S. 1081.[35]

Moreover, since livestock production is cyclical, with some periods of decreasing volume and other periods of increasing volume, to fail to use the most recent volume data would, at times, result in setting rates too low.

It is only in the case of litigation that there is a serious time lag between the most recent cost data and the most recent volume data; and this time lag creates no actual problem because during the interval between the filing of the final Decision and Order and the effective date thereof, respondents can easily file applications for increased rates based on more recent data, and the applications will be acted upon by complainant before the effective date of the Order. See *In re Giles Lowery, supra*, 35 Agr Dec at 294; *Federal Power Commission* v. *Hope Gas Co.*, 320 U.S. 591, 615.

IV. *Allowances in Lieu of Actual Expenses.*

Respondents contend that the complainant's ratemaking procedure is invalid because complainant substitutes allowances based on national averages for actual expenses, which procedure allegedly fails to reflect local conditions at each market. However, as shown in Finding 1, *supra*, about 60% to 65% of a market's actual expenses are generally accepted by complainant as reasonable and necessary.

35. Judge Palmer's proposed rates are higher than complainant's proposed rates primarily because he used the base year volume data rather than the most recent volume data.

Hence 60% to 65% of a market's Total Reasonable Revenue Requirement is determined entirely by local conditions.

Complainant substitutes allowances for actual expenses with respect to only four categories of expenses, *viz.*, (i) interest on working capital; (ii) owner's compensation (as worker and/or manager); (iii) business getting and maintaining; and (iv) bad debts.

The allowances for the first three categories of expenses just referred to are based on the volume of livestock at the individual market, and the bad debt allowance is based on the value of livestock at the individual market. Hence each of these allowances reflects local conditions. (As shown in section V of the Conclusions, *infra*, the other allowances similarly reflect local conditions.)

Complainant's use of certain allowances in lieu of actual expenses was expressly approved in *In re Giles Lowery, supra*, 35 Agr Dec at 294-297. Judge Palmer erred in believing that *Giles Lowery* afforded the allowances only "probative value"; and he erred in believing that an audit or appraisal of an individual market is necessary before the allowances may be used even to that limited extent (Initial Decision, p. 72). Judge Palmer erroneously thought that complainant's substitution of allowances for actual expenses in this proceeding was a departure from prior cases; but the practice has been followed, and approved, for decades. *Giles Lowery* held that complainant properly substituted allowances for certain expenses irrespective of the actual facts that were revealed by audit.

Similarly, in *Tagg Bros.* v. *United States*, 280 U.S. 420, 440-442, the Court affirmed the Secretary's rate determination under the Packers and Stockyards Act "based upon an assumed cost of the service [including owner's compensation and business getting and maintaining expenses] which disallowed expenses actually incurred" (280 U.S. at 441).

Complainant's substitution of reasonable allowances for an owner's determination of his own worth is also supported by *United Gas Co.* v. *Texas*, 303 U.S. 123, 148-151, concurring opinion by Mr. Justice Black; *AT&T Co.* v. *United States*, 299 U.S. 232, 239; *Western Distrib'g Co.* v. *Comm'n*, 285 U.S. 119, 125-127; and *Chicago &c. Railway Co.* v. *Wellman*, 143 U.S. 339, 345-346.

The Secretary's determination of a reasonable allowance in lieu of actual Business Getting and Maintaining expenses was also approved in *Acker* v. *United States*, 298 U.S. 426, 430-431. In *Acker*, as in the present case, the "contention is that the amount to be expended for these [Business Getting and Maintaining] purposes is purely a question of managerial judgment" (298 U.S. at 430). However, the Court held in *Acker* (298 U.S. at 430-431):

> But this overlooks the consideration that the charge is for a public service, and regulation cannot be frustrated by a requirement that the rate be made to compensate extravagant or unnecessary costs for these or any purposes. We are not persuaded that the conclusions as to proper allowances on this head were without substantial support in the record.

Similarly, in *United States* v. *Morgan*, 313 U.S. 409, 415, the Court held:

> [S]ince the Secretary is the guardian of the public interest in regulating a business of public concern it is not for him merely to reflect the items on a profit and loss statement. He must consider whether these represent services which properly should be charged to the public. * * * [The Secretary is] not merely a bookkeeper posting items into a ledger. Rates to which these public agencies were entitled were not be be derived merely from their expenditures and actual income.

In *Tagg Bros., supra*, the Court affirmed the Secretary's rate order notwithstanding the fact that the Secretary removed bad debts as an expense, and made no allowance whatever for bad debts (280 U.S. at 441-442). *A fortiori*, an allowance for bad debts based on the industry average bad debt experience is valid.

Hence the overall attacks on complainant's allowance system by respondents and Judge Palmer are without merit. Similarly, as shown in the following subsections, the specific amounts of the allowances are reasonable.

A. *Owner's Compensation.*

Complaint's basic allowance for a working owner of an auction stockyards provides 50¢ per animal unit on the first 20,000 units sold at the market, 25¢ per unit on the next 20,000 and 5¢ per unit for each unit over 40,000. One cattle, one horse or one mule equals one animal unit under this formula; a hog equals one-third of a unit; and a sheep equals one-fourth of a unit.[36] The result obtained is tested for reasonableness by comparing it with local guidelines, such as the highest salary paid to hired auction market employees in the area.

The concept of the animal unit was devised because the cost associated with the sale of different species varies according to the species; but revenue analysis requires consistent treatment of all livestock sold at a market. The formula for converting total livestock received to animal

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36. An "animal unit factor for horses of 2 would be better than 1" (CX 72, p. 27), but this would not significantly affect the results nationwide (*ibid.*), or in this proceeding. Giving horses a factor of 2 would make no change in the computations for Major Lewis or Travis McGee, and would increase the Total Reasonable Revenue Requirements for Bill and Lois Rice and Central Arkansas by about $75 and $141, respectively.

units was supported by a statistical analysis by Dr. Everett O. Stoddard, an Agricultural Economist for complainant (CX 72, pp. 24-27).

The 20,000 break in the compensation formula derives from *In re Market Agencies at Sioux City Stock Yards*, 9 Agr Dec 4, 92 (1950), where it was found that 20,000 units is a reasonable yearly sales volume for one cattle salesman, although some salesmen can sell twice that number, or more. Of course, there are no cattle salesmen at an auction market, but complainant analogizes one cattle salesman to one working owner.

The 40,000 break is based on the concept that above this point additional people probably will have to be hired to accomplish the task. The 5¢ per unit compensation on sales above 40,000 per year is designed to give the working owner some incentive to increase his volume (Tr. 32-33, 182-186).

The *Sioux City* case, *supra*, holds that the allowance for a working owner should be no greater than the going rate for the work that the owner actually performs; that is, the allowance should equal the amount for which the market could hire a third party to perform the job. Complainant's present formula for computing a working owner's allowance was adopted in 1970, and is reviewed continuously. Mr. Jack M. Brinckmeyer, Chief of complainant's Rate Branch, testified that the formula still provides more than adequate compensation for a market's working owner. It generally provides twice as much revenue as the cost of hiring an auctioneer, who is the highest paid employee at an auction market (Tr. 182-186, 229).

The allowances provided each respondent as a working owner were as follows (Figs. 1-4, *supra*):

Major Lewis	$16,758
Central Arkansas Auction Sale, Inc.	8,612
Travis McGee	8,677
Bill and Lois Rice	7,691

However, in only one instance did complainant have to disallow any reported salary expense prior to providing an allowance because the non-corporate respondents did not itemize individual owner compensation in terms of salaries and separate withdrawals of profits (CXs 5, 7, and 8). The corporate respondent, Central Arkansas Auction Sale, Inc., did report the following salary expenses for each officer/owner (CX 6, Sec. 12, p. 7):

Robert L. Gregory, President	$ 5,562.88
Sherman Durham, Vice President	3,895.98
Mrs. Roy R. Chaney, Sec. Treas.	3,895.99
Total	$13,354.85

This corporate respondent failed to report in its 1974 annual report what labor its officers performed on sale day. However, Mr. Sherman Durham testified that he acted as auctioneer on sale day (Tr. 646). In this respondent's annual report for the base year 1974, each officer was reported to have devoted 100% of his time to the auction market activity and none to any dealer or other activity. Correspondingly, the salary reported was claimed as relating exclusively to auction market activity. However, Mr. Durham admitted on cross-examination that he was also employed by respondents Bill and Lois Rice in the capacity of auctioneer (Tr. 654). The 1974 annual report for Bill and Lois Rice (CX 8) shows that Mr. Durham was paid an average of $35.69 per sale day, or a total of $1,820, for performing the same function for which he was given

a salary of $3,895.98 by his own firm. Complainant's exhibit 8 also reports the President of the Central Arkansas Auction Sale, Inc., Mr. Robert L. Gregory, as a major dealer and packer-buyer at that auction market (CX 8, section 14-A&B, p. 8). Hence the record does not support the claim in the corporate respondent's annual report that its officers devoted 100% of their time to auction market activity.

The foregoing facts demonstrate why complainant must provide an allowance in lieu of any reported owner or officer salary expenses. Such expenses are not fixed as the result of arm's-length bargaining and, therefore, cannot be accepted as being equivalent to what the owner or officer would have to pay to hire an employee to perform equivalent work at the market (CX 72, pp. 28-29).

The principle of substituting an allowance for owners' and officers' salaries was supported by respondent's expert, Dr. Pickett (Tr. 590-591). Although Dr. Pickett challenged the specific amounts of complainant's working owner allowance (Tr. 592), his challenge was based on a misunderstanding of complainant's procedure. He assumed that the allowance for a working owner was judged to be reasonable by complainant solely on the basis of a national analysis, and questioned the propriety of such a procedure. That question need not be determined here since complainant does not simply replace (or provide, if not claimed), a salary expense for work performed without giving full consideration to reliable local guidelines. The basic guideline followed in this proceeding was the highest salary paid a hired employee without ownership interest; namely, the auctioneer at Major Lewis' market, Mr. Roger Williams, who was paid $7,980 (CX 5 Sec. 13; Tr. 179). Additional guidelines or standards were also provided by markets handling fewer animal units:

Respondent	*Employee*	*Amount Paid (base year)*	
Bill Rice and Lois Rice	Sherman Durham (Hired Auctioneer)	$1,820	(CX 8, Sec. 13)
Central Arkansas Auction Sale, Inc.	Joe Yarbrough (Ringman)	$4,200	(CX 6, Sec. 13)
Travis McGee	Walter Millsaps (Hired Weighmaster)	$1,535	(CX 7, Sec. 13)
	Roger Williams (Hired Auctioneer)	$3,190	

Based on the substantial testimony provided by witnesses for complainant as to the reasonableness of the allowances provided for work performed by owners or officers, and the failure of respondents to present meaningful contrary testimony, I conclude that the allowances provided respondents are at least sufficient to fully compensate the owners or officers for the work they performed at the market.

Added to the allowance for a working owner or officer is an allowance to compensate for management of the market. The allowance for management is based on 6.25¢ per animal unit, and is allowed irrespective of whether the owner works at the market, but not if he has a paid manager.

The 6.25¢ figure derives from the *Sioux City* case, *supra* (9 Agr Dec 4, 99), where such amount was deemed reasonable. In 1970, in order to determine whether the allowance was still reasonable, complainant surveyed markets having pure management costs, that is, markets having managers performing no other function. That survey indicated that management costs average 5.8¢ per animal unit sold. In other words, the survey indicated 6.25¢ per animal unit is generous (Tr. 34-35, 182-190; *Giles Lowery, supra,* 35 Agr Dec at 297). The amount of the allowance, which is re-

viewed continuously, was last reviewed in 1973 or 1974 (Tr. 183).

In determining the reasonableness of the allowances for an owner's work and management, an important consideration is the fact that owning and managing a market is generally not a full-time occupation. Most markets have a livestock sale only one day a week. In addition to working at that sale, many owners operate livestock dealer and other business activities, and some operate two or more auction markets.

Considering all of the circumstances, if complainant's allowances for compensation as the owner and manager of a market are in error, the error is in respondents' favor.[37]

An obvious shortcoming of complainant's allowances for an owner's work and management is that they provide the same *rate* irrespective of the quality of the work or the extent of the owner's effort.[38] However, this shortcoming is partially diminished since the owner's actual compensation is based on the market's volume; and it is likely that increased effort or excellence of effort will result in greater volume, and thus greater compensation. But even with this shortcoming, the allowance is superior to a determination by a market owner as to his worth.

B. *Interest.*

Complainant properly removes any reported interest expense since interest expense should be borne by the market owner rather than the rate payers. Moreover,

37. Respondents' contention that the owners' allowances do not compensate them for guaranteeing payment to consignors overlooks the "bad debt" allowance.

38. However, if a working owner performs functions *greatly* in excess of a normal working owner's functions, the allowance for a working owner would be increased.

interest expense must be removed to prevent double compensation to the market owner. As stated by Mr. Brinckmeyer (Tr. 24-25):

> A. The amount shown for interest in the animal report is deducted completely. The concept in rate regulation is that the interest paid should not be paid by the rate payers that use the service but should be paid by the owners or stockholders of the market. Interest needed to service the debt and provide working capital is allowed later on in our analysis. If additional interest is required by the market operator, it should be a part of the expenses paid by the owner or the stockholders and not the rate payer.
>
> Q. If you did accept interest and not remove it, what would be the practical effect of so doing?
>
> A. If we didn't remove interest and left it in the analysis and continued to provide a return on the investment and a return on the working capital, the rate payer would be paying that interest expense twice.

Respondents' rate expert, Dr. Pickett, objected to the exclusion of interest; but he erroneously thought that complainant "only give[s] him a return on that portion of the barn that he finances with common equity" (Tr. 605). Actually, complainant provides a return on the total value of the market's buildings and equipment.

Only two of the respondents, Major Lewis and Bill and Lois Rice, reported any interest expense. The $2,843 reported by Bill and Lois Rice as interest expense, which complainant removed (Fig. 4, line 2), was paid on debt incurred to construct the market's facilities (Tr. 570). Hence the return they get on their building and equipment offsets that interest expense. In the case of Major

Lewis, an interest item of $8,262 was reported and removed (CX 5, Sec. 7; Fig. 1, line 2). No testimony was presented as to the use of the debt upon which such interest was paid. Furthermore, this respondent did not present any testimony in regard to its operations or any of the adjustments made by complainant. Hence complainant's prima facie showing that interest expense should be removed was not overcome by either respondent.

After removing interest expense, complainant adds an allowance for interest on working capital equal to 12.5¢ per animal unit sold during the base year, unless an audit demonstrates that the funds available to the market from rate payers make it unnecessary to borrow working capital (Tr. 36-37). All four respondents in this proceeding received the allowance for interest on working capital. Complainant's allowance for interest on working capital is adequate in view of the prompt payment requirements of the Act and regulations (7 U.S.C. 213; 9 CFR 201.43(b)).[39]

C. *Bad Debts.*

Complainant's bad debt allowance was adequately explained and justified by Jack W. Brinckmeyer at the hearing in this proceeding (Tr. 25-26, 200-201). However, since his explanation of the matter was slightly more complete in the *Giles Lowery* case (and also to minimize my effort), the following material is lifted from the *Giles Lowery* decision (35 Agr Dec at 297-299).[40]

The allowance for bad debts was computed on the basis of .0003 times the gross value of livestock sold by the

39. See, also, the 1976 prompt payment amendments to the Act (Pub. Law 94-410, § 7, 90 stat. 1250).

40. The Tr. references refer to the *Giles Lowery* record.

respondent at the stockyards during the base period (Tr. 14, 39, 92-95, 146, 169). The allowance is included by complainant even if a market has no bad debts (Tr. 146). The rationale for the allowance was explained by Jack W. Brinckmeyer, Chief of complainant's Rate Branch, as follows (Tr. 169-170):

> As Mr. Hammond testified, and I think we started making this allowance approximately five or six years ago, at one time there was no allowance made for bad debts.
>
> They were just taken out of the formula [a]nd forgot[ten] about.
>
> But we realized that since the market operator was required to pay for the livestock when it was sold and that he had to make collections that there could be some losses from these activities.
>
> However, there again experience showed that the market operator if he had an extraordinary bad debt in one year this was basically his whole justification for trying to modify an increase in rates.
>
> In 1968 we surveyed the entire auction industry in the United States to determine the bad debt losses for the years 1965 and 1966.
>
> That survey showed that the bad debt loss for those two years averaged this .0003 in relation to the [gross] value of livestock sold.
>
> So it was determined that we would take out whatever bad debts were shown and replace them by this allowance based on the experience of the industry, based on the philosophy that if this amount [was] provided for rates each year that over a period of time that should have equaled the amount of bad

debts that a prudent management would have at their market.

Again, to see that our figures were still reliable and current or at least reliable, last year for the [years] 1972 and 1973 bad debt losses have been surveyed for the auction industry, and I don't have the exact figures here, but I think in 1972 it was .00019 and in 1973 it was .0002 something.

Both years show that the average put together that it would be less than .0003 so we're continuing to use that factor for our allowance for bad debts.

For many years, the complainant removed all bad debt expenses and made no allowance for bad debt losses. However, in 1968 or 1969, the complainant began making an allowance based on the stockyard industry's average bad debt experience (Tr. 169). The allowance is reasonable. If a market operator is prudent, his bad debt experience should, over a period of years, be close to the industry average. If he is imprudent, there is no basis for making his particular shippers suffer the consequences of his imprudence.

Even if a market owner suffers bad debt losses over the years greater than the industry's average, without any negligence or imprudence on his part, there is no reason to make his shippers suffer the consequences of such losses.

A market owner is not required to extend credit to any buyer. He can demand cash from all purchasers, or from particular purchasers who have not established their financial standing with the market owner. Moreover, when credit is extended, the purchaser ordinarily pays for the livestock within a week. The regulations issued under the Act require packers, market agencies and dealers purchasing livestock to pay for such livestock before

the close of the next business day following the purchase thereof, unless otherwise expressly agreed between the parties before the purchase of the livestock (9 CFR 201.43 (d)). The Department stated in the explanation accompanying this regulation (29 F.R. 1796):

> The purpose of the amendment is to establish a uniform rule regarding payment for livestock purchased by packers, market agencies, and dealers consistent with (1) the established custom that sales of livestock are on a cash basis, and (2) the provisions of present § 201.43 of the regulations under which market agencies selling livestock on a commission basis transmit or deliver net proceeds to shippers before the close of the next business day following the sale of the shippers' livestock.

The foregoing "prompt payment" regulation, together with the custom either to demand cash payment, or, more frequently, to require payment in a few days, results in extremely small bad debt losses in the stockyards industry.

The respondent argues that the First Bank and Trust, Lufkin, Texas, a banking corporation with $50 million in assets, had a bad debt experience of one-half of one percent (Tr. 420; Appeal, pp. 10-11). However, banks are in the business of lending money on a long term basis whereas the livestock industry is essentially "on a cash basis" (29 F.R. 1796). This explains why the stockyards industry has a much lower bad debt experience than the banking industry.

If the complainant allowed bad debt losses up to one-half of one percent, the respondent could be allowed bad debt losses up to $55,000 for the base year (11,000,000 x .005; Appeal, pp. 10-11). That would be entirely unreasonable

in the stockyards industry. [End of quotation from *Giles Lowery*.]

The reasonableness of using .0003 times the gross value of livestock sold during the base year was further confirmed by the auction industry's bad debt experience in 1974, which was .00023 for the nation and .00027 for all Arkansas markets (Tr. 36).[41]

D. *Business Getting and Maintaining.*

Business Getting and Maintaining expenses include market support expenses, travel, entertainment and similar expenditures (Tr. 142). Complainant's allowance for Business Getting and Maintaining expenses is equal to the actual amount of such expenses during the base year, subject to a limit of 25¢ per animal unit sold during the base year. The concept of placing a limit on such expenses has been followed by the Department since 1922. The current limitation of 25¢ per animal unit was set in 1973 (Tr. 192). The reason for the limitation was explained by Mr. Brinckmeyer as follows (Tr. 28; see, also, Tr. 371, 401-402):

> Now, the philosophy for limiting business getting expenses is that the consignors to a market should not be required to pay an unlimited amount to convince them to use the services of the stockyard. When one firm increases their business-getting expenses and obtains consignments that may take the business from another market, he ups his expenses for business getting and gets the business back, if we had no limit on it, the rate payers could be paying an unreasonable

41. Recently enacted legislation (Pub. Law 94-410, 90 Stat. 1249), which should reduce the industry's bad debt experience, might justify reducing the bad debt allowance at some future time.

> amount to convince them to use the services of the market.

The great bulk of respondents' Business Getting and Maintaining expenses resulted from market support expenditures. Market support was described in *Giles Lowery, supra,* as follows (35 Agr Dec at 277, 302-303):

> Market support is the term generally used in the auction market business to describe the bidding by a market operator or his representative at auction which bidding ends in the purchase of the animal by the market. Such bids are placed not with the intention to purchase the animal, but rather to stimulate bids from other buyers. This process is entirely voluntary; many markets do not engage in it.
>
> Animals purchased through market support are either again run through the auction ring at the same market or transported to another market for sale. The market support, account at a market is charged with the losses, if any, associated with disposing of such animals. Where applicable, these losses include transportation costs, feed costs and the difference between the purchase price at which the market bought the animal and the selling price of the animal when the market sold it.
>
> * * *
>
> Market support purchases by a market do not occur because the market has guaranteed the price at which the livestock will be sold. It is unlawful for a stockyards to guarantee the price at which consigned livestock will be sold (9 CFR 201.64). However, some markets, including the respondent, bid on livestock, at times, hoping to stimulate further bids; but if no further bids are received, the market becomes the purchaser of the livestock.

Since market support is a voluntary activity engaged in by a market, there is no basis for saddling rate payers with unlimited market support expenses. For example, Major, Lewis' market support expenses of $52,156 during the base year were 23% of his total expenses that year (Tr. 371). Complainant's limit $18,791 in the case of Major Lewis (Fig. 1, line 17) is necessary to prevent rate payers from being burdened with an unreasonable amount of voluntary, business getting expenses. As shown above, the Supreme Court has expressly approved limiting Business Getting and Maintaining expenses.

V. *Additional Allowances.*

A. *Return on Buildings and Equipment.*

Complainant's allowance for the return on respondents' buildings and equipment during the base period is computed on the basis of 10% of the original cost, when first dedicated to the public use, of the buildings (including improvements) and equipment, less depreciation. This is the only allowance under complainant's auction market rate analysis which is based on a rate of return times value. The comparable allowance upheld in *Giles Lowery, supra,* was computed using 8% instead of 10% (35 Agr Dec at 314-316).

Respondents do not challenge the use of original cost less depreciation.[42] However, respondents contend that the rate of return should be 13% rather than 10%.

The material from the following paragraph to footnote 44, *infra,* is taken verbatim from *Giles Lowery, supra* (35 Agr Dec at 314-316), upholding complainant's use of an

42. For a discussion of this matter, see *Giles Lowery, supra,* 35 Agr Dec at 307-314.

8% rate of return on buildings and equipment.[43] *A fortiori,* complainant's use of a 10% rate of return is not too low.

> There is no precedent [prior to *Giles Lowery*], administrative or judicial, which gives any meaningful guideline for determining the rate of return to be applied to the value of a livestock auction market's buildings and equipment.

The complaint cites as a "guide" to determining the rate of return on buildings and equipment the case of *In re St. Paul Union Stockyards Company, supra,* 21 Agr Dec 1216, 1291 (1962), in which the Judicial Officer stated:

> We believe we shall discharge our obligations to the investor and treat the rate payer fairly if we provide revenues sufficient for the company to pay (a) its actual operating expenses prudently and economically incurred; (b) an annual charge for depreciation based upon the expected life of the properties; (c) taxes; (d) interest on its debt at the rate actually paid; (e) a reasonable dividend on its outstanding stock; and (f) something to be added to the surplus to enable the company, under good management, to maintain and support its credit.

However, that case involved a terminal stockyards, which, as shown above, is quite different from an auction stockyards. In the *St. Paul* case, *supra,* the rate base, consisting of land, buildings, equipment and working capital, was $5,118,810 (21 Agriculture Decisions at 1315). Buildings and equipment alone were valued at $3,294,167, or 64.4% of the total rate base (*ibid.*). The Judicial Officer, applying the criteria quoted in the preceding paragraph, concluded that the "reasonable rate of return which the

43. The Tr. references refer to the *Giles Lowery* record.

respondent is entitled to earn on the rate base, after an allowance for all reasonable operating expenses, depreciation, and income taxes, is 7.75 percent" (*ibid.*). The terminal stockyard owners' income resulted from applying the 7.75% rate of return to the $5,118,810 rate base (*ibid.*).

But as shown above, only 4.9% of Giles Lowery's income from the auction market depends on the rate of return (or 9.3% if the operating margin is not considered). Hence the rate of return was decisive as to the total income of the stockyard owners in the *St. Paul* case, but is decisive as to only a very small part of an auction market owner's income. Hence the six criteria quoted above from the *St. Paul* case provide no meaningful guideline as to the rate of return to be applied to the value of an auction market's buildings and equipment. If relevant at all to an auction market, the six criteria would be useful only in determining whether the auction owner's total income from the stockyards was just and reasonable.

To the extent that an auction market owner used borrowed funds to pay for the buildings and equipment, complainant should give some consideration to the fourth criterion quoted above, *viz.*, "interest on its debt at the rate actually paid." In this case, the respondent corporation borrowed funds from the Small Business Administration at 8% annual interest (Tr. 89-92). The complainant's 8% rate of return, therefore, allows respondent to service its debt.

The complainant also cites for guidance as to the rate of return to be applied to the value of the respondents buildings and equipment the rate of return allowed in other regulated industries. This also is a factor that should be given some consideration. Recent rate cases show wide variations in the rates of return allowed. The majority, however, are in the range of 8%. The following table of

rate case was cited by the Chief Administrative Law Judge as representative (Initial Decision, p. 28): to show that investment in the stockyards industry is a relatively safe investment (Tr. 199-200). Moreover, as shown above, since the rate of return affects such a negligible portion of an auction owner's total income, even if the stockyards industry were not a relatively safe investment, the rate of return could not have much of an effect on the situation.[44]

Respondent's rate expert, Dr. Pickett, would have used traditional ratemaking principles applicable to capital intensive natural monopoly public utilities, and he presented expert testimony around a 13% assumed rate of return. However, as shown previously, auction market operators are more analogous to owner-operators of individual taxicabs than to capital intensive public utilities. The return on an auction operator's buildings and equipment is ordinarily a very minor part of his total return from the auction stockyards, *e.g.*, 4.9% in *Giles Lowery*. The comparable percentages for Major Lewis, Central Arkansas, Travis McGee and Bill and Lois Rice are 3.6%, 13.4%, 4.7% and 37.2%.[45] Hence only in the case of Bill and Lois Rice, which is highly unusual, is the return from buildings and equipment a large matter.

Moreover, Dr. Pickett admitted that under his procedure, he would not add allowances for management or operating margin (Tr. 613).[46] When consideration is given

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44. End of quotation from *Giles Lowery, supra.*

45. These percentages are computed from Figs. 1-4, *supra*, by comparing the return on buildings and equipment to the total return, consisting of allowances for working owner, management, interest on working capital, buildings and equipment, land and operating margin.

46. However, Dr. Pickett would provide for taxes; and a small portion of the operating margin is occasionally used for taxes.

to the large allowances for operating margin, $30,066, $6,890, $6,942 and $6,152, respectively (Figs 1-4, *supra*), the complainant's use of a 10% rate of return plus the allowances for operating margin and management produces total income far in excess of that which would be produced from a 13% rate of return without these allowances (see complainant's original brief, pp. 143-153).[47]

Considering all of the circumstances, complainant's use of a 10% rate of return, which applies only to the return on buildings and equipment, is reasonable.

B. *Land.*

Prior to 1968, complainant's allowance for land was computed by multiplying the rate of return times the value of the land. Since then, the allowance for land has been computed on the basis of 6¢ per animal unit sold by the stockyard during the base year. The present formula generally provides a return much greater than would be provided under the pre-1968 rate of return formula—*e.g.*, in the case of *Giles Lowery, supra,* more than three times greater than an allowance computed by multiplying the rate of return times the land's present value (35 Agr Dec at 307). In the present case, Judge Palmer found that complainant's land formula provided a 20% return on the value Central Arkansas placed on its land (CX 6, p. 2), which "would be excessive" (Initial Decision, p. 33).

Complainant's land allowance is adequately supported by the present record (Tr. 29-31, 193-194), but the follow-

47. Dr. Pickett's analysis is also faulty because of his erroneous assumption that complainant's 10% return applies only to that portion of the buildings and equipment financed with common equity, and not to that portion of the investment financed by debt (Tr. 605).

ing explanation by Jack W. Brinckmeyer, Chief of complainant's Rates, Services and Facilities Branch, is lifted from *Giles Lowery, supra* (35 Agr Dec at 279-280):

> Land values has been a problem. [In] 1958 when I started handling the rate work for our agency we were exploring several methods of determining the value of land, what we should use. If we went back to the original cost as the Hope Natural Gas said we could, it would have had a very startling effect on the industry.
>
> So after trying to index it on farm prices of land and several other things we determined that some allowance for the use of land based on the unit of livestock would probably be the most fair way to the regulated industry and to the rate payer and treat each one of them fairly.
>
> In the early 1960's appraisals had been made of several of the major stockyards. This included Sioux City, St. Paul, Oklahoma City, Louisville, Kentucky, and the land appraisals at that time and the units of livestock were evaluated to determine what the unit allowance would be.
>
> From reviewing those firm's annual reports and the appraisal of the land at those stockyards we came up with a unit cost of five point eight eight cents per unit.
>
> We recommended to the administrator, the Packers and Stockyards Administration, that we adopt the method of allowing a use for land of six cents per unit. We adopted that approximately [in 1968], as I recall, and since that date all land values of stockyards is based on six cents per unit.

> The old method of trying to use appraisals, if you appraised it one day and the next day it was out-dated, each individual person had his ideas, we had to follow in determining how much was used and useful such as this, with this allowance the stockyard operator knows that he's going to receive six cents for each unit of livestock that he handles. If he wants to utilize less acres of land he gets a better return for his property. If he wants to spread it out we don't have to go through the problem of determining the useful area and value or trying to determine the original cost. Most of the markets have no records that will support their original cost of the land. [End of quotation from *Giles Lowery*.]

Mr. Brinckmeyer testified in the present proceeding with respect to the continued adequacy of the 6¢ per animal unit formula (Tr. 194):

> If I revised it I would revise it down because what we are using is about 10 times more than cost.

If complainant were to revert to a land allowance based on a rate of return times value, complainant would, of course, have to determine how many acres of land were "used and useful" for stockyard purposes. For example, in *Giles Lowery*, if complainants had been using a rate of return times value land formula, it would have considered only 6½ of Giles Lowery's 25 acres as used and useful for stockyard purposes. (35 Agr Dec at 280). Giles Lowery's volume of 56,788 animal units (35 Agr Dec at 278) was almost four times as much as the volume, *e.g.*, of Bill and Lois Rice; so it is obvious that the 80 acres reported by Bill and Lois Rice would have been drastically reduced.

Moreover, if complainant were required to return to a rate of return times value land allowance for auction markets, there is no reason to believe complainant would now use present value rather than original cost. See *Federal Power Commission* v. *Hope Gas Co.*, 320 U.S. 591; *Federal Power Commission* v. *National Gas Pipeline Company*, 315 U.S. 575.[48]

Judge Palmer, relying on Supreme Court cases involving *terminal* stockyards, held that complainant's land allowance must be based on an appraisal of its present value (Initial Decision, p. 39). However, as shown above, the great differences between terminal and auction stockyards makes it inappropriate to apply terminal market rate-making principles to auction markets. Moreover, the two cases just cited (*Hope Gas* and *National Gas*) freed rate regulatory bodies from the rigid requirements previously in effect.

In *Federal Power Commission* v. *National Gas Pipeline Company*, 315 U.S. 575, the Court sustained an order of the Commission under the Natural Gas Act. In discussing the scope of judicial review of rates prescribed by the Commission, the Court held (315 U.S. at 586):

> The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.

In a concurring opinion in that case by Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy, it is stated (315 U.S. at 602-606):

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48. In *In re St. Paul Union Stockyards Co.*, 21 Agr Dec 1216, 1234-1236 (1961), complainant *voluntarily* used the present value of a *terminal* stockyard's land.

While the opinion of the Court erases much which has been written in rate cases during the last half century we think this is an appropriate occasion to lay the ghost of *Smyth* v. *Ames*, 169 U.S. 466, which has haunted utility regulation since 1898. That is especially desirable lest the reference by the majority to "constitutional requirements" and to "the limits of due process" be deemed to perpetuate the fallacious "fair value" theory of rate making in the limited judicial review provided by the Act.

* * *

The rule of *Smyth* v. *Ames* as construed and applied, directs the rate-making body in forming its judgment as to "fair value" to take into consideration various elements—capitalization, book cost, actual cost, prudent investment, reproduction cost. * * * The risks of not giving weight to reproduction cost have been great. * * * The havoc raised by insistence on reproduction cost is now a matter of historical record.

* * *

As we read the opinion of the Court, the Commission is now freed from the compulsion of admitting evidence on reproduction cost or of giving any weight to that element of "fair value."

In *Federal Power Commission* v. *Hope Gas Co.*, 320 U.S. 591, the Court again considered an order of the Federal Power Commission prescribing rates under the Natural Gas Act. The Commission established the rate base on the basis of the "actual legitimate cost" of the property involved less depreciation (320 U.S. 596). Evidence of the cost of reproduction new was given no weight by the Commission on the grounds that it was "not predicated upon facts" and was "too conjectural and illusory to be given

any weight" (320 U.S. at 597). The Commission also refused to give any "probative value" to "trended 'original cost' " because it was "not founded in fact," was "basically erroneous," and produced "irrational results" (320 U.S. at 597).

Previously, the Court of Appeals has reversed the Commission's order (134 F.2d 287), and among the grounds for reversal were: (1) that the rate base should reflect the "present fair value" of the property; (2) that the Commission should have considered reproduction cost and trended original cost; and (3) that "actual legitimate cost" (prudent investment) was not the proper measure of "fair value" where price levels had changed since the investment.

The Supreme Court reversed the Court of Appeals, stating (320 U.S. at 602):

> We held in *Federal Power Commission* v. *Natural Gas Pipeline Co., supra,* that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of "pragmatic adjustments." * * * And when the Commission's order is challenged in the courts, the question is whether order "viewed in its entirety" meets the requirements of the Act. * * * Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. * * * It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.

In the present state of development of the law of ratemaking, it is "the result reached not the method employed which is controlling" (*Hope, supra,* 320 U.S. at

602). Accordingly, complainant is not required to appraise the value of an auction market's land so long as its method produces reasonable results. And there is no evidence to contradict complainant's evidence that its land formula produces very generous results for auction markets.

In addition, it is important to recognize that the land allowance will, under any formula, produce only a tiny fraction of an auction market's total income—generally 3% to 5%. Considering the generous operating margin and the relative insignificance of the land allowance *for an auction stockyard,* there is no rational basis for requiring complainant to increase its rate staff from 4 rate experts to perhaps 400, which would be needed to make yearly land appraisals.

The record in this case fully supports complainant's land allowance.

C. *Operating Margin.*

Complainant's allowance for operating margin is computed on the basis of 40¢ per animal unit sold at the auction during the base period. As stated in *Giles Lowery, supra,* (35 Agr Dec at 281):

> The purpose of the operating margin is to provide revenue above the actual cost of providing auction services to take care of contingencies. Otherwise, unexpected changes in costs or revenues would place an unwarranted burden on the market operator during the period it would take him to secure a rate change. The operating margin also includes an allowance for the market's income taxes, if any; but most auction markets do not have to pay income taxes as a separate entity from the owners (Tr. 39-40, 170-172, 274-277; Comp. Ex. 12).

The operating margin was similarly explained and justified by Mr. Brinckmeyer in this proceeding (Tr. 37-38). To the extent that the operating margin is not used up by contingencies, etc., it constitutes an element of profit (Tr. 181).

The large operating margins allowed respondents in this proceeding, $30,066 for Major Lewis, $6,890 for Central Arkansas, $6,942 for Travis McGee and $6,152 for Bill and Lois Rice are clearly adequate for the above purposes and provide an additional safeguard to insure that no respondent can justifiably complain as to the "result reached" (*Hope, supra,* 320 U.S. at 602) by complainant's rate procedure.

VI. *Per-Head-Weight Tariffs Should be Prescribed for Respondents.*

Where, as here, respondents' rates and charges have been found to be unjust and unreasonable, the Secretary may "determine and prescribe what will be the just and reasonable rate or change, or rates or changes, to be thereafter in such case observed as both the maximum and minimum to be charged" (7 U.S.C. 211). Since it is impossible to predict what rates would be produced in the future by value-based tariffs (see Findings 12-18, *supra*), it is impossible to determine that any particular rates or charges under value-based tariffs will in the future be "just and reasonable," which is the statutory criteria for prescribed rates. Accordingly, I have no alternative but to prescribe rates under per-head-weight tariffs (see Findings 12-18, *supra*).

This practical necessity for prescribing per-head-weight tariffs arises irrespective of any issue of discriminatory rates resulting from value-based tariffs. In other words, irrespective of any issue of discrimination, since I

cannot predict what revenue would be produced in the future by a value-based tariff, I have no way of predicting (or even guessing) whether rates prescribed in a value-based tariff would be "just and reasonable" in the future. Hence once the occasion arises to prescribe rates for an auction market because its rates have been held to be unjust or unreasonable, the prescribed rates must be on a per-head-weight basis so that the prescribed rates will meet the statutory criteria of "just and reasonable" rates.

The discrimination aspect of value-based tariffs, referred to in Findings 12 through 18, *supra*, presents an additional reason, separate and distinct from that just given, for prescribing rates in per-head-weight tariffs in this proceeding. Under the facts set forth in Findings 12 through 18, *supra*, value-based tariffs are inherently discriminatory, and, therefore, they fail to meet the statutory standard for "just, reasonable, and nondiscriminatory" rates or charges (7 U.S.C. 206).[49]

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49. In view of the facts reflected in Findings 12 through 18, *supra*, value-based tariffs cannot be regarded as nondiscriminatory on the ground that the "value" of the stockyard service varies with the value of the animal sold. The facts in Findings 12-18 indicate that the "value" of the stockyard service involved in selling two similar animals is the same irrespective of whether one animal sells for a higher price than the other. Even respondent's expert, Dr. Pickett, when asked whether he had made a decision as to whether a stockyard consignor was buying a service on a "per head or value basis," replied, "No, I know cost is incurred on a per head basis" (Tr. 633). Further, when asked "[h]ow would you propose to measure the value to consignors of livestock auctions," Dr. Pickett replied, "You do not do that under typical rate-making" (Tr. 638). But even if value-based livestock tariffs were not inherently discriminatory, whenever rates are found to be unreasonably high, leading to prescribed rates for the future, the prescribed rates must be in the form of a per-head-weight tariff because of the unpredictability of the revenue that would be generated in the future under a value-based tariff.

In any future rate proceeding, Findings 12 through 18, *supra*, shall be regarded as creating a rebuttal presumption that value-based tariffs are inherently discriminatory and, therefore, unlawful under the Act. Accordingly, in any future rate proceeding, complainant will not have to introduce any proof in this respect. If, however, respondents introduce contrary evidence in a future proceeding, complainant may introduce evidence with respect to this issue and, also, have official notice taken of the evidence relating to this matter in the present proceeding. Since the evidence as to discrimination in this proceeding relates to "legislative facts," as distinguished from "adjudicative facts," it is appropriate to rely on such evidence in future proceedings. See *In re J. A. Speight*, 33 Agr Dec 280, 310-313 (1974); *In re Trenton Livestock, Inc.*, 33 Agr Dec 499, 522-523 (1974), affirmed *sub nom. Trenton Livestock, Inc.* v. *Butz*, 510 F.2d 966 (C.A. 4).

Although complainant states in its briefs that it is seeking a holding that value-based tariffs are illegal *per se*, complainant actually is seeking only a rebuttable presumption, in this respect. Hence it is neither necessary nor appropriate to hold that value-based tariffs are illegal *per se*. Where particular conduct has been held *per se* to violate a statute, proof of such conduct is *conclusively* presumed to violate the Act as a matter of law[50] As stated in *United States* v. *McKesson & Robbins*, 351 U.S. 305, 309-310:

> It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its il-

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50. See, *e.g.*, *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 212-213; *International Salt Co.* v. *United States*, 332 U.S. 392, 396; *United States* v. *Masonite Corp.*, 316 U.S. 265, 274-282; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 212-228; *United States* v. *Trenton Potteries*, 273 U.S. 392, 396-401.

legality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices (footnotes omitted).

Accordingly, it is unnecessary to rule on the issue discussed below as to whether an effort to establish a *per se* rule as to value-based tariffs should be made in a general rulemaking proceeding rather than in a particular rulemaking[51] proceeding such as this. It would seem, however, that it would not be an abuse of administrative discretion to attempt to establish such a principle in an individual rulemaking proceeding rather than in a general rulemaking proceeding. See *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 199-203; *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 761-766; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295.

VII. *The Prescribed Rates Apply to the Posted Stockyard Facilities as Well as to Respondents.*

Rates prescribed in a formal rate proceeding have always been regarded as applying to the posted stockyard facility, as well as to the individually named respondent. A specific provision in the Order to this effect is desirable to preclude any attempt at evasion of this Decision and Order by any respondent changing his business entity and filing a number one tariff (Tr. 226). Such specific provision should make it clear that the same type of continuation of formal rate orders that applies in the case of terminal markets also applies in the case of auction markets (Tr. 226). A change of business entity is not difficult or uncommon. For example, respondent Central Arkansas Auction Sale, Inc., reported a change during the base period from a partnership to a corporation. Accordingly, the Order in this proceeding will expressly state that it applies not only to the individual respondents but also to the posted stockyards at which respondents operate.

51. The "prescription for the future of rates" is, of course, rulemaking (5 U.S.C. 551(4) and (5)).

ORDER

1. Each respondent, or successor operating at the same posted stockyard facility, shall cease and desist from demanding or collecting for any stockyard service any rate or change different than those found by the Secretary to be just, reasonable and nondiscriminatory.

2. Respondent Major Lewis, d/b/a Major Lewis Livestock Auction Sale, shall assess the schedule of rates and charges as set forth below, and shall not, hereinafter, publish, demand or collect any rate or charge for the furnishing of any stockyard service more or less than the rate or charge for the service set forth in such schedule:

A. *REGULAR SELLING-YARDAGE CHARGES*

Ordinary Cattle:	
Weighing less than 300 lbs.	$1.85 per head
Weighing 300 lbs. and more	2.50 per head
Bulls:	
All bulls 800 lbs. and over	6.00 per head
Cow and Calf sold as pairs:	6.50 per pair

Horses, Ponies and Mules:	6.00 per head
Hogs:	
Weighing less than 150 lbs.	.75 per head
Weighing 150 lbs. and over	1.25 per head
Sows and pigs sold as unit	2.00 per unit
Sheep and Goats:	1.00 per head

B. *RESALE AND NO-SALE CHARGES*

Definitions: (1) Resale charges shall apply on all livestock resold without leaving the market premises.

(2) No-sale charges shall apply when a consignor declares his consignment no-sale on price bid, bids in his consignment or withdraws the same prior to actual sale.

Charges: One-half (1/2) of the regular selling and yardage charges shall be assessed on all resales and no-sales.

C. *FEED*

The charge for all feed sold shall be the average monthly cost F.O.B. the market plus $0.005 per lb., $0.50 per cwt.

D. *VETERINARY SERVICES*

The schedule of charges on all necessary veterinary services performed by an accredited veterinarian will be at posted uniform per rates, pursuant to company agreement with the veterinarian performing such services

and does not contain any charges retained by the market.

E. *SPECIAL SALES OR SERVICES*

Special sales or unusual stockyard services such as are included in featured registered cattle and calf sales, annual 4-H sales and sales for one consignor sold on other than regular sale days which require special services and handling will be charged for under special arrangements agreed to between the parties prior to the special sales.

3. Respondent Travis McGee, d/b/a Atkins Livestock Auction, shall assess the schedule of rates and charges as set forth below, and shall not, hereafter, publish, demand or collect any rate or charge for the furnishing of any stockyard service more or less than the rate or charge for the service set forth in such schedule:

A. *REGULAR SELLING-YARDAGE CHARGES*

Ordinary Cattle:	
Weighing less than 300 lbs.	$2.00 per head
Weighing 300 lbs. and more	3.05 per head
Bulls:	
All bulls 800 lbs. and over	6.00 per head
Cow and Calf sold as pairs:	6.50 per pair
Horses, Ponies and Mules:	6.00 per head
Hogs:	
Weighing less than 150 lbs.	$ .75 per head
Weighing 150 lbs. and more	1.25 per head
Sows and pigs sold as unit	2.00 per unit
Sheep and Goats:	1.00 per head

B. *RESALE AND NO-SALE CHARGES*

Definitions: (1) Resale charges shall apply on all livestock resold without leaving the market premises.

(2) No-sale charges shall apply when a consignor declares his consignment no-sale on price bid, bids in his consignment or withdraws the same prior to actual sale.

Charges: One-half (1/2) of the regular selling and yardage charges shall be assessed on all resales and no-sales.

C. *FEED*

The charge for all feed sold shall be the average monthly cost F.O.B. the market plus $0.005 per lb., $0.50 per cwt.

D. *VETERINARY SERVICES*

The schedule of charges on all necessary veterinary services performed by an accredited veterinarian will be at posted uniform per head rates, pursuant to company agreement with the veterinarian performing such services and does not contain any charges retained by the market.

E. *SPECIAL SALES OR SERVICES*

Special sales or unusual stockyard services such as are included in featured registered cattle and calf sales, annual 4-H sales and sales for one consignor sold on other than regular sale days which require special services and

handling will be charged for under special arrangements agreed to between the parties prior to the special sales.

4. Respondent Central Arkansas Auction Sale, Inc., shall assess the schedule of rates and charges as set forth below, and shall not, hereafter, publish, demand or collect any rate or charge for the furnishing of any stockyard service more or less than the rate or charge for the service set forth in such schedule:

A. *REGULAR SELLING-YARDAGE CHARGES*

Ordinary Cattle:	
Weighing less than 300 lbs.	$1.90 per head
Weighing 300 lbs. and more	2.90 per head
Bulls:	
All bulls 800 lbs. and more	6.00 per head
Cow and Calf sold as pairs:	6.50 per pair
Horses, Ponies and Mules:	6.00 per head
Hogs:	
Weighing less than 150 lbs.	.75 per head
Weighing 150 lbs. and more	1.25 per head
Sow and Pigs sold as a unit	2.00 per unit
Sheep and Goats:	1.00 per head

B. *RESALE AND NO-SALE CHARGES*

Definitions: (1) Resale charges shall apply on all livestock resold without leaving the market premises.

(2) No-sale charges shall apply when a consignor declares his consignment no-sale on price bid, bids in his consignment or withdraws the same prior to actual sale.

Charges — One-half (1/2) of the regular selling and yardage charges shall be assessed on all re-sales and no-sales.

C. *FEED*

The charge for all feed sold shall be the average monthly cost F.O.B. the market plus $.005 per lb., $0.50 per cwt.

D. *VETERINARY SERVICES*

The schedule of charges on all necessary veterinary services performed by an accredited veterinarian will be at posted uniform per head rates, pursuant to company agreement with the veterinarian performing such services and does not contain any charges retained by the market.

E. *SPECIAL SALES OR SERVICES*

Special sales or unusual stockyard services such as are included in featured registered cattle and calf sales, annual 4-H sales and sales for one consignor sold on other than regular sale days which require special services and handling will be charged for under special arrangements agreed to between the parties prior to the special sales.

5. Respondents Bill Rice and Lois Rice, d/b/a Cleburne County Livestock Auction Sale, shall assess the schedule of rates and charges as set forth below, and shall not, hereafter, publish, demand or collect any rate or charge for the furnishing of any stockyard service more or less than the rate or charge for the service set forth in such schedule:

A. *REGULAR SELLING-YARDAGE CHARGES*

Ordinary Cattle:	
Weighing less than 300 lbs.	$2.00 per head
Weighing 300 lbs. and more	$3.05 per head
Bulls:	
All Bulls 800 lbs. and over	6.00 per head
Cow and Calf sold as pairs:	6.50 per pair
Horses, Ponies and Mules	6.00 per head
Hogs:	
Weighing less than 150 lbs.	.75 per head
Weighing 150 lbs. and more	1.25 per head
Sows and pigs sold as unit	2.00 per unit
Sheep and Goats:	1.00 per head

B. *RESALE AND NO-SALE CHARGES*

Definitions: (1) Resale charges shall apply on all livestock resold without leaving the market premises.

(2) No-Sale charges shall apply when a consignor declares his consignment no-sale on price bid, bids in his consignment or

withdraws the same prior to actual sale.

Charges — One-half (1/2) of the regular selling and yardage charges shall be assessed on all re-sales and no-sales.

C. *FEED*

The charge for all feed sold shall be the average monthly cost F.O.B. the market plus $.005 per lb., $0.50 per cwt.

D. *VETERINARY SERVICES*

The schedule of charges on all necessary veterinary services performed by an accredited veterinarian will be at posted uniform per head rates, pursuant to company agreement with the veterinarian performing such services and does not contain any charges retained by the market.

E. *SPECIAL SALES OR SERVICES*

Special sales or unusual stockyard services such as are included in featured registered cattle and calf sales annual 4-H sales and sales for one consignor sold on other than regular sales days which require special services and handling will be charged for under special arrangements agreed to between the parties prior to the special sales.

6. At least 10 days prior to the effective date of this Order, each respondent, or successor operating at the same posted stockyard facility, shall publish, give notice of and file with the Secretary of Agriculture, in accordance with the Packers and Stockyards Act, 1921, as amended, a schedule of rates and charges for such respondent as set forth above.

7. The rates and charges found just, reasonable, and nondiscriminatory for each respondent at its stockyard shall be the rates and charges to be assessed and collected at that posted stockyard by respondent or successor market agency until modified or dismissed by an Order of the Secretary.

8. This Order shall become effective as to any respondent, or successor operating at the same posted stockyard facility, 60 days after service thereof upon such respondent.

APPENDIX C

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Central Arkansas Auction Sales, Inc.	)	P. & S. Docket No. 5249
	)	
Major Lewis d/b/a Major Lewis Livestock Auction Sales,	)	P. & S. Docket No. 5250
	)	
Bill Rice and Lois Rice d/b/a Cleburne County Livestock Auction Sale,	)	P. & S. Docket No. 5251
	)	
Travis McGee d/b/a Atkins Livestock Auction,	)	P. & S. Docket No. 5252
	)	
Respondents	)	

DECISION AND ORDERS

Pursuant to 7 CFR § 202.33, this decision is transmitted to the Hearing Clerk for filing in each of the above-captioned proceedings simultaneously with the appropriate attached order.

/s/ Victor W. Palmer
Victor W. Palmer
Administrative Law Judge

Dated: November 19, 1976

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Central Arkansas Auction Sales, Inc.	)	P. & S. Docket No. 5249
	)	
Major Lewis d/b/a Major Lewis Livestock Auction Sales,	)	P. & S. Docket No. 5250
	)	
Bill Rice and Lois Rice d/b/a Cleburne County Livestock Auction Sale,	)	P. & S. Docket No. 5251
	)	
Travis McGee d/b/a Atkins Livestock Auction,	)	P. & S. Docket No. 5252
	)	
Respondents	)	

DECISION

Preliminary Statement

This is a rate hearing under the Packers and Stockyards Act of 1921, as amended (7 U.S.C. 181 *et seq.*), hereinafter referred to as "the Act". The respondents, on January 13, 14 and 15, 1976, filed Proposed New Tariffs with the Secretary wherein, effective February 1, 1976, their charges for the sale and handling of cattle consigned to their respective livestock auction markets would basically be increased, from three percent (3%) of the first $2,000 of the gross sale proceeds obtained for a consignor and two percent (2%) on any sum obtained in excess of $2,000, to four percent (4%) of the first $2,000 plus three percent (3%) on any sum above $2,000.

As owners and operators of livestock auction markets which are "stockyards" under 7 U.S.C. § 202, respondents furnish "stockyard services" within the meaning of 7 U.S.C. § 201(b). The charges for stockyard services are lawful only if "just, reasonable, and nondiscriminatory" (7 U.S.C. § 206); must be shown in a schedule filed with the Secretary of Agriculture and open to the public (7 U.S.C. § 207(a)); and may be changed only upon notice to the Secretary who may challenge the lawfulness of the proposed new rates and charges by entering upon a hearing during the pendency of which the operation of the new rates may be suspended for no more than sixty days (7 U.S.C. § 207(c) and (e)). Whenever, after such hearing, "the Secretary is of the opinion that any rate, charge, . . . for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged . . ." (7 U.S.C. 211).

When respondents filed their proposed new tariffs, they were reviewed by officials of the Packers and Stockyards Administration, hereinafter "P&SA," who are charged by the Secretary with the responsibility of administering the Act. P&SA thereupon instituted these proceedings as to each of the proposals because each would continue, at increased rates, percentage charges which P&SA has concluded are *per se* unreasonable and discriminatory, and because its analyses of available data led P&SA to the conclusion that the proposed rates would result in revenues greater than the reasonable requirements of each respondent. Accordingly, on January 30, 1976, P&SA filed a separate Complaint, Order of Suspension and Notice of Hearing, whereby these proceedings were instituted, and

the proposed rates and charges were initially suspended for thirty days. Copies of the Complaint, Notice of Hearing and Order of Suspension for each respondent were published in the Federal Register on February 17, 1976 (41 F.R. 7162-7164), and among other things stated that "respondent and all other interested persons will have a right to appear" and present relevant evidence. On February 26, 1976, the suspensions were extended for an additional thirty days, or sixty days overall.

On February 26, 1976, a Motion for Expedited Assignment of a Date for Oral Hearing was filed in each docket herein, in which the complainant requested that a consolidated oral hearing be held to develop a record applicable to each of the above-captioned proceedings. The proceedings were thereafter referred to Victor W. Palmer, Administrative Law Judge, who, pursuant to a Notice of Hearing issued March 12, 1976, conducted a consolidated oral hearing in Little Rock, Arkansas, on April 1 and 2, 1976, and on April 22 and 23, 1976. Complainant was represented by Eric Paul, Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C., and the respondents were represented by George F. Hartje, Jr., Esquire, of Conway, Arkansas. The time for filing proposed findings of fact, conclusions and orders was extended until July 26, 1976, as a result of mutual requests by the parties.

At the time it filed its brief, complainant moved that various corrections be made to the pleadings and the transcript; those motions were granted on August 6, 1976. The parties were requested by notice issued on August 6, 1976, to file written statements expressing their views as to whether the decision in these proceedings should be delayed pending appeal of *In re Giles Lowery Stockyards*, 35 A.D. 267, issued on March 26, 1976, which was the first

proceeding by the Department examining the rates and charges of an auction market in thirty one years. Complainant's counsel filed its statement of position on August 18, 1976, and advised that, in its opinion, a delay would not be in the interest of the parties or the public. Respondents' counsel, by letter filed August 20, 1976, advised that such a delay would be satisfactory but that time to examine the decision that is handed down by the Fifth Circuit on the appeal and to develop arguments on its relativity to the instant proceedings would then be needed. The rules contemplate expeditious handling of Title III rate-making proceedings, and in light of the replies by the parties, it has been decided that this decision should not be withheld.

Transcript of the hearing consisted of 661 pages. References to specific pages of the transcript will be preceded by the letter "T". Complainant called five (5) witnesses and introduced ninety-five (95) exhibits into evidence. Respondents called five (5) witnesses and introduced six (6) exhibits. Complainant's exhibits will be designated "Ex". Respondents' exhibits will be designated "Res. Ex".

Findings of Fact

The Respondents' Markets

1. Each respondent owns and operates an auction market where livestock are sent to respondents on consignment and thereafter sold at public auctions held one day a week. Respondents conduct the auctions and in addition to those services, provide the owners of the consigned livestock various yardage services which consist of: receiving, holding, sorting, weighing, delivery, shipment of livestock, accounting, inspection, and testing if needed, and delivery to buyers of their agents. Charges to consignors for

the combination of the selling and yardage services provided by respondents must accord with tariffs filed with the Secretary and publicly posted at the markets pursuant to 7 U.S.C. § 207. Each market comes within the definition of a "stockyard" and is "posted" as such pursuant to 7 U.S.C. § 202. The yardage and selling services provided are considered "stockyard services" and each respondent is therefore treated and registered as a "market agency" in addition to being a "stockyard owner" (7 U.S.C. §§ 201 and 203). Certain of the respondents also come within the Act's definition of "dealer" in respect to business conducted for their own account apart from the cattle sold on consignment. The primary services provided by respondents to consignors are those directed to the sale of the livestock, and the yardage services furnished are incidental. The annual reports filed by each respondent as required by regulations administered by P&SA show that the principal items of expense borne by each respondent relate to selling activities on behalf of consignors which include, in addition to providing the services of an auctioneer, expenses undertaken to attract prospective buyers to the market and yield to consignors the highest prices possible. Additional to these findings of general applicability, it is specifically found that:

a) Respondent, Major Lewis d/b/a Major Lewis Livestock Auction Sales, is an individual with his place of business at Conway, Arkansas, who, at all times pertinent hereto, was engaged in the business of operating a posted stockyard under the Act; engaged in the business of selling livestock on a commission basis at the stockyard and as a dealer buying and selling livestock in commerce; and registered with the Secretary of Agriculture as a market agency to sell on commission and as a dealer to buy and sell livestock in commerce. On January 13, 1976, this respondent

filed his proposed Tariff No. 3 to become effective February 1, 1976, in replacement of respondent's Tariff No. 2 which had been effective since January 6, 1961.

b) Respondent, Central Arkansas Auction Sales, Inc., is a corporation with its place of business at Morrilton, Arkansas, which, at all times pertinent hereto, was engaged in the business of operating the Central Arkansas Auction Sales, Inc., a posted stockyard under the Act; engaged in the business of selling livestock on a commission basis at the stockyard; and registered with the Secretary of Agriculture as a market agency to sell livestock in commerce. The respondent corporation came into being on June 9, 1974, as successor in interest to a partnership whose members are respondent's officers. On January 13, 1976, this respondent filed its proposed Tariff No. 2 to become effective February 1, 1976, in replacement of Tariff No. 1 which had been effective since March 2, 1971.

c) Respondent, Travis McGee d/b/a Atkins Livestock Auction, is an individual with his place of business at Atkins, Arkansas, who, at all times pertinent hereto, was engaged in the business of operating a posted stockyard under the Act; engaged in the business of selling livestock on a commission basic at the stockyard and as a dealer buying and selling livestock in commerce; and registered with the Secretary of Agriculture as a market agency to sell on commission and as a dealer to buy and sell livestock in commerce. On January 14, 1976, this respondent filed its proposed Tariff No. 2 to become effective February 1, 1976, in replacement of respondent's Tariff No. 1 which had been effective since April 18, 1972, as amended, effective March 28, 1973, by Supplement No. 1 which pertained to horse and mule sales only.

d) Respondents, Bill and Lois Rice, are partners, doing business as Cleburne County Auction Sales, with a place of business at Heber Springs, Arkansas, who, at all times pertinent hereto, were engaged in the business of operating a posted stockyard under the Act; engaged in the business of selling livestock on a commission basis at the stockyard and since at least July 2, 1975, were also engaged in dealer activities buying and selling livestock in commerce for their own account; and registered with the Secretary of Agriculture as a market agency to sell on commission and, since July 2, 1975, as a dealer to buy and sell livestock in commerce. On January 15, 1976, these respondents filed their proposed Tariff No. 3 to become effective February 1, 1976, in replacement of respondents' Tariff No. 2 which had been effective since April 10, 1973.

2. The livestock auction markets of the respondents are located within the State of Arkansas in rural areas with the largest on the edge of "a fairly good size town", where averages of sales sampled during the period May 1975 through March 1976 showed the following types and volumes of livestock transactions at each respondents' weekly auction (T. 126, T. 413-417, Exs. 74-77).

Major Lewis Livestock Auction Sales, in Conway, Arkansas

Calves and Cattle under 300 lbs.—286 head

Cattle 300 lbs. and over—1372 head

Bulls 800 lbs. and over—26 head

Hogs—38 head

Sheep and Goats—11 head

Horses and Mules—5 head

Cow/Calf pairs—11 head

Central Arkansas Auction Sales, Inc., in Morrilton, Arkansas

Calves and Cattle under 300 lbs.—76 head

Cattle 300 lbs. and over—373 head

Bulls 800 lbs. and over—9 head

Hogs—12 head

Sheep and Goats—1 head

Horses and Mules—1 head

Cow/Calf pairs—8

Atkins Livestock Auction, in Atkins, Arkansas

Calves and Cattle under 300 lbs.—56 head

Cattle 300 lbs. and over—341 head

Bulls 800 lbs. and over—11 head

Hogs—22 head

Sheep and Goats—6 head

Horses and Mules—6 head

Cow/Calf pairs—18

Cleburne County Livestock Auction Sale, in Heber Springs, Arkansas

Calves and Cattle under 300 lbs.—58 head

Cattle 300 lbs. and over—210 head

Bulls 800 lbs. and over—7 head

Hogs—5 head

Sheep and Goats—2 head

Horses and Mules—2 head

Cow/Calf pairs—17

The respondents' most recent annual reports show the following totals of livestock consigned to each market for the year ending December 31, 1974 (Item 9, Exs. 5-8):

a) *Major Lewis Livestock Auction Sales*

Calves and Cattle—75,165

b) *Central Arkansas Auction Sales, Inc.*

Calves and Cattle—16,734

Hogs—983

Sheep and Goats—30

Horses and Mules—154

c) *Atkins Livestock Auction*

Calves and Cattle—17,354

d) *Cleburne County Livestock Auction*

Calves and Cattle—15,211

Hogs—215

Sheep and Goats—65

Horses and Mules—82

The P&SA marketing unit concept has proven itself to be a valuable and practical way to compare various livestock handled; under it, 1 unit is the equivalent of 1 cattle, or 1 calf, or 1 horse, or 1 mule, or 3 hogs, or 4 sheep, or 4 goats. This ratio is found to accurately represent an auction market's proportionate costs of furnishing stockyard services to each consigned species of livestock except for horses and mules for which the cost expenditure is found to be twice that indicated. Utilizing this concept, Exs. 5-23 and Exs. 74-77 have been compared, and it is found that the exhibits indicate the following number of marketing units were consigned annually to each respondent market:

	Major Lewis	Central Arkansas	Atkins	Cleburne
1969	51,900	30,079		
1970	43,327	26,990		
1971	53,000	26,058		12,833
1972	71,747	27,064	17,561	13,132
1973	65,500	23,396	(not in evidence)	15,764
1974	75,165	17,144	17,354,	15,381
(annual projection from May '75 - March '76 sample)	89,804	24,908	23,868	15,392

The reports for 1974 most reliably reflect the volumes each market typically handles on consignment with Central Arkansas annually handling 17,200 units and Atkins Livestock handling 17,400 units. A third respondent, Cleburne County Livestock Auction Sales, annually handles 15,400 units and of this number, unlike the other respondents, nearly 25% of the units were the private property of the market's owners (Item 9, Ex. 8). In contrast to the other markets, Major Lewis handled in excess of 75,000 units per year. Complainant produced both expert testimony and authoritative economic texts to the effect that 30,000 units per year is the average minimum number at which an auction market is economically efficient with 20,000 units being the "absolute minimum" and 40,000 the "practical minimum" or the point at which cost efficiencies are dissipated (T. 276-277, and Ex. 73, p. 28).

Competing Markets in Arkansas

3. Within the State of Arkansas, there are a total of 50 auction markets including those of the respondents:

a) At the commencement of the hearing, the tariffs at 9 of the markets were on a "per head" basis wherein a charge was specified for each animal sold regardless of the price obtained.

b) Thirty-seven markets, including the 4 respondents, had tariffs which charged consignors a percentage of the sale price; of these, 28, including 3 of the respondents, charged 3% of the first $2,000 of gross revenue obtained for a consignor's livestock plus 2% on sums above $2,000; the fourth, Cleburne, received a flat 3% of total gross revenue obtained for its consignors. Of the remainder of the markets utilizing percentage tariffs, 8 have the higher rates respondents seek wherein they charge consignors 4% on the first $2,000 plus 3% on sums above $2,000; and 1 market has an intermediate percentage type tariff utilizing a basic rate of 3.5%.

c) There are also 4 markets utilizing a "valuation" tariff which is similar to a percentage tariff in that it is based on the prices paid for a consignor's livestock, but is fixed on a bracketed basis, e.g., a sum certain on gross sale proceeds of less than $50, a higher sum certain on sale proceeds of $50 to $100, etc. (T. 13-14, T. 487, T. 527-528 and Res. Ex. 3).

4. Cattle and calves have been and will probably continue to be the predominant type of livestock consigned to respondents' markets. The cattle usually come from farms within a 25 to 30 mile radius of each market, although larger markets such as that of Major Lewis may receive cattle from consignors as much as 100 miles distant (T. 128-129). These 4 markets are within a 40 mile radius

of each other with 50 miles being the effective range of intermarket competition (T. 129-131 and T. 487-488). The principal limitation on the distance from which cattle will be transported to a market is the cost borne by the consignor for trucking which is not included as part of the market's tariff. It costs a farmer consigning cattle to a market in the area approximately $1.00 per head for trucking them a 20-30 mile distance (T. 539). Trucks in the area can carry 35 head of cattle with trucking charges averaging about $1.00 a mile (T. 513).

5. Of the 50 markets within the State of Arkansas, a total of 15 are in actual competition in the area served by the 4 respondents, although only the largest, Major Lewis, competes with all 15. The competition of the smallest, Cleburne, is limited to 9 of the markets (T. 129-131, T. 562 and Ex. 70). Utilizing the 50 mile effective range of intermarket competition, complainant has prepared a map (Ex. 70) of the State of Arkansas, with the boundaries of the respondents' area of intermarket competition shown, as well as the total inventory of cattle contained within each county normally supplying respondents' markets as of January 1, 1975:

Inventory of all cattle and calves on farms as of 1-1-75

SOURCE: 1974 Agricultural Statistics for Arkansas Report Series 221 Issued July 1975.

The 15 markets involved are designated on Ex. 70 by the first 15 letters of the alphabet. These markets are also listed in Res. Ex. 4 which shows the type tariff effective at each market at the commencement of the hearing. Combining both lists:

Map Designation	Market	Tariff
A	*Respondent Atkins* (Pope County)	3%
B	*Respondent Major Lewis* (Faulkner County)	3%
C	*Respondent Cleburne* (Cleburne County)	3% (flat)
D	*Respondent Central Arkansas* (Conway County)	3%
E	McCracken Livestock Auction, Inc., Batesville (Independence County)	4%
F	Nuel Hill Livestock Auction, Batesville (Independence County)	4%
G	Beebe Community Auction, Beebe (White County)	3%
H	Van Buren County Auction Sales, Clinton (Van Buren County)	3%
I	Searcy County Auction Co., Marshall (Searcy County)	4%
J	Farmers and Ranchers Livestock Auction, Mountain View (Stone County)	4%
K	Shantz & Rodman Livestock Commission Company, Inc., North Little Rock (Pulaski County)	per head
L	Arkansas National Stockyard Co., Inc., Little Rock (Pulaski County)	per head

Map Designation	Market	Tariff
M	Montgomery County Livestock Auction, Searcy (White County)	4%
N	White Auction Company, Russelville (Pope County)	3%
O	Ola Livestock Company, Ola (Yell County)	per head

The Functions of Respondents' Markets and Auction Markets in General

6. In addition to consignments to auction markets, cattle and calves are sold directly to packers and through country dealers, as well as by consignment to terminal markets where market agencies sell livestock by private treaty. The number of head to be sold and the cost of transportation are prime determinants of which sales method will be chosen by ranchers and farmers. It is normally the farmer with but a few head to sell, such as a dairy farmer culling his herd, who will select the local auction market. The limited number of cattle he has to offer does not attract visits from packing house representatives or dealers to his farm to buy from him directly; even though direct purchase is the principal form of purchase by packing houses and accounted for 72.2% of their cattle purchases, excluding calves, in 1972 (T. 262 and Ex. 72, Table 9, p. 48). Nor will it be economically practicable to pay transportation rates based on mileage to transport a few head to distant terminal markets. The local auction market being close, transportation costs are at a minimum, and yet bring together a large number of "dealers" as well as other farmers seeking replacement animals. Auction markets therefore serve as assembly points for livestock, particularly calves and cattle from

small volume farms, and without them the prices farmers would receive for their livestock would probably be considerably diminished (T. 263-264).

7. The principal purchasers of cattle and calves at auction markets are either farmers seeking replacement animals or those who seek stocker and feeder cattle. In 1972, 37.2 million head of cattle and 6.9 million head of calves were sold at auction markets, and those purchased by meat packers only amounted to 4.7 million and 1.7 million head, respectively.

The impact of sales at auction markets upon the prices consumers pay for beef is remote and insignificant; this is demonstrated by the fact that of the 32 million head of cattle purchased by packers in 1972, only 14.6% were purchased at auction markets consisting of 3 million cows and bulls and 2 million steers and heifers. The fact that less steers and heifers were purchased at auction markets by packers than cows and bulls is highly significant in light of the preference of packers for steers and heifers as slaughter animals; they constituted 81% of the cattle purchased by packers in 1972 and the 2 million purchased at auction markets constituted only 7% of their total steer and heifer purchases.

On the other hand, sales at auction markets directly impact upon veal prices. In 1972, packers purchased 2.8 million calves of which 1.7 million or 61% were purchased at auction markets (T. 262 and Ex. 72, Tables 9 and 10, pp. 48-49).

Findings on the impact of sales at auction markets upon consumer prices for pork, lamb and mutton have not been included since the numbers of hogs and sheep consigned to the respondent markets are insufficient for such

findings to be relevant to the proper level of respondents' tariffs.

8. The respective percentages of beef and veal purchased by packers at auction markets in comparison with purchases at terminal markets and direct purchases, is most strikingly illustrated by two graphs contained in the June 23, 1975 statement of Gerald Engelman, Director, Industry Analysis Staff, P&SA, to the Subcommittee on SBA-SBIC Legislation House Small Business Committee, official notice of which is hereby taken.

CATTLE

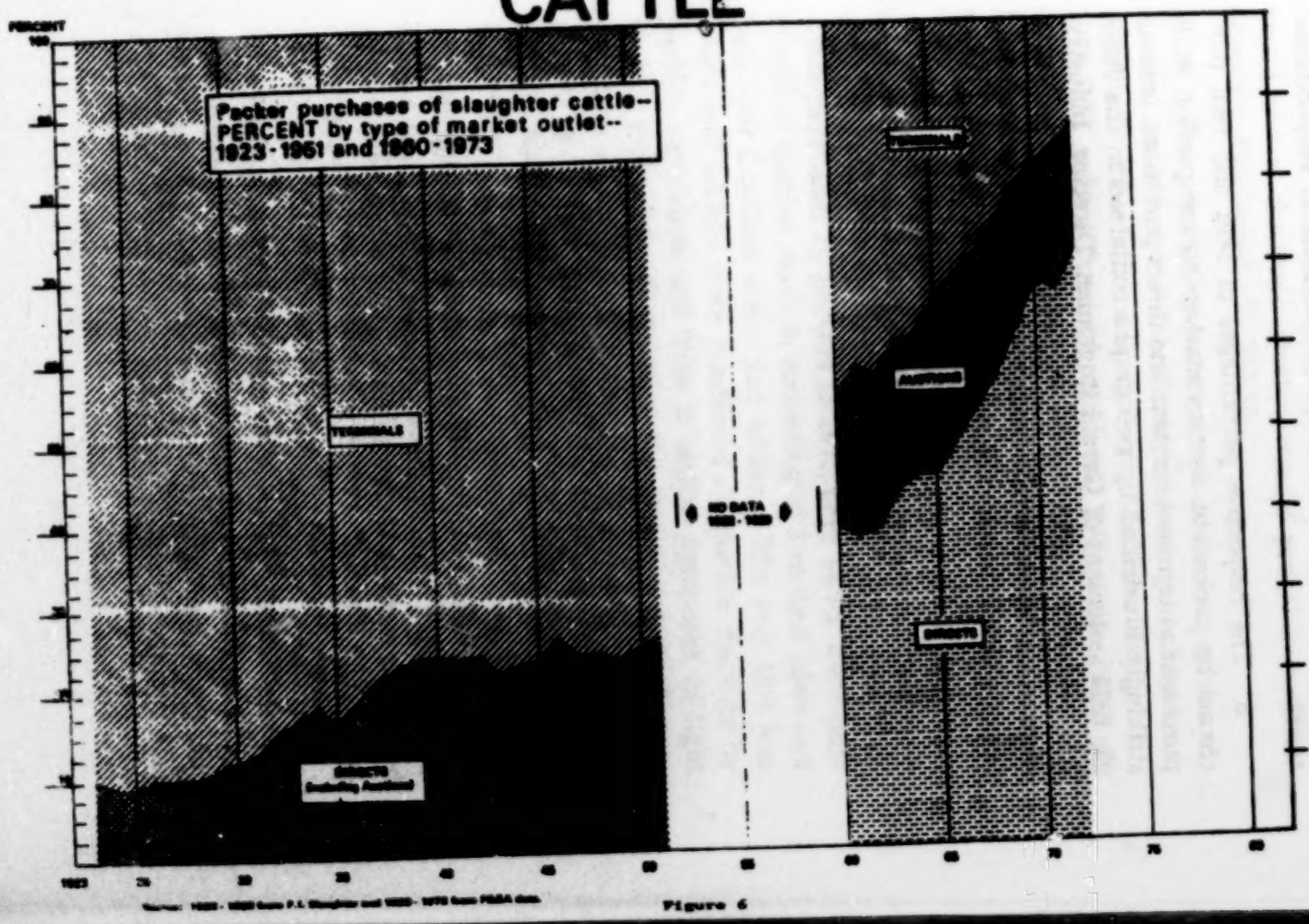

Figure 6

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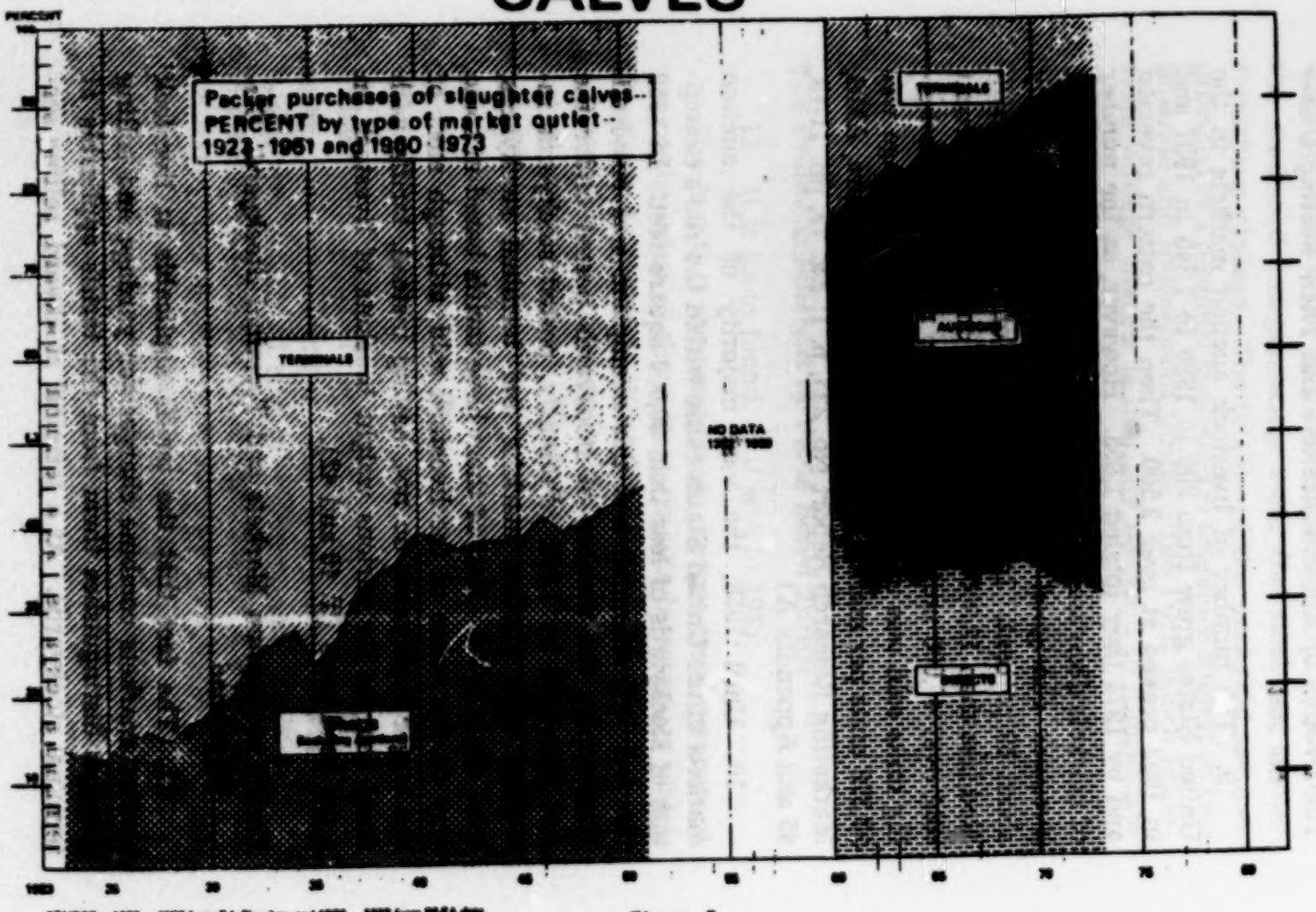
CALVES



SOURCE: 1923 - 1959 from P.S. Slaughter and 1960 - 1973 from PSA data

Figure 7

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The Growth of Auction Markets and Their Posting Under the Act

9. The number of livestock auction markets in the United States grew from 200 in 1930 to 1,345 in 1937 and in 1952 peaked at over 2,500. Then the pattern reversed and by 1972 they totaled 1,855. However, as the number of markets decreased between 1955 and 1972, the volume of livestock consigned to individual markets increased by about 89 percent. In 1955, over half of the auctions handled less than 10,000 marketing units, only about 5 percent sold over 40,000 units and the average number of marketing units sold was under 16,000. In 1972, the average was 30,278 units per market. (U.S. Dept. of Agriculture, AMS, Marketing Research Report No. 223, p. 1; Ex. 72, pp. 11-13, 45 and Appendix A)

10. Until 1958, the vast majority of the auction markets in the United States came within the Act's exemption of stockyards of less than 20,000 square feet. In 1958 the Act was amended and this exemption was removed. Whereupon, the number of stockyards posted under the Act increased by 1,600. Presently, posted stockyards including both auction markets and terminal stockyards, total about 2,000. Half of them have tariffs based in some way on the value of the livestock sold, although most of the larger stockyards do not, having instead, tariffs with fixed charges for various weight brackets of livestock on a per head basis (T. 40 and 42).

Tariffs at Auction Markets and Terminal Stockyards Distinguished

11. The fact that the tariffs applicable at livestock auction markets combine charges for yardage and selling services distinguishes them from the tariffs applicable at terminal stockyards. At a terminal stockyard, selling services are undertaken by market agencies which operate at the stockyard independently from the stockyard owner furnishing yardage. The totality of the stockyard services provided at a terminal stockyard is therefore subject to two separate and independent tariffs. The tariff which represents yardage charges is basically designed to compensate the stockyard owner for his capital investment. The tariff for the selling services provided by an independent market agency is designed to compensate services basically personal in nature which involve little or no capital investment. The tariff designed for an auction market must do both with compensation for personal services being the principal element involved.

The Problems Inherent in Value Based Tariffs

12. It is again found, as it was in 1945:

> The fact that the commission charges are a percentage of the value of the animals results in revenues which fluctuate greatly. When livestock is extremely cheap revenues are extremely low irrespective of the cost of doing business. When the prices of livestock are extremely high, the revenues of the respondent are correspondingly high irrespective of the cost of rendering the service. Greater stability is desirable. (*In re Foust-Yarnell Stock Yards*, 4 A.D. 826, at p. 832)

Value-based tariffs are as their designation suggests, value rather than cost oriented. The relationship between such tariffs and the actual cost of rendering stockyard services in a consignor's behalf is at best indirect and coincidental (T. 42). Time studies performed by P&SA show that the time and effort expended by a market to sell a high priced animal is no greater than that expended selling an animal of poor quality fetching a low price. As a general rule, the

converse is often true since good quality animals are bid on faster and sell in less time than animals of low quality (T. 60). Yet value-based tariffs as cost allocators, place a disproportionate and discriminatory burden upon consignors of high quality animals (T. 51-52).

Cost studies further show that a market's expenses have a pattern of change consistent with the wholesale price index and change much more gradually than livestock prices; so that when livestock prices increase sharply and dramatically, so do the revenues generated by a value-based tariff even though increases in the market's expenses are much more gradual and do not reach a corresponding level (T. 70-72, T. 126, Exs. 51-59).

Whereas the revenue produced by a per head tariff solely depends upon the volume of livestock sold, the revenues which value-based tariffs yield are dependent both on volume and on the prices received. Statistical studies show that livestock inventory has been fairly constant since 1925 except that the cattle cycles have peaked every 10 years contrasted with livestock prices which are quite variable (T. 95-118, Exs. 69 and 71). Projections of the revenues that will result from per head tariffs may be made with some degree of dependability, but projections of the revenues that will be produced by value-based tariffs tend to be inaccurate (T. 41-42).

13. Livestock prices, particularly those for cattle, have generally risen during the course of recent years with the exception of the autumn of 1974. This has resulted in revenues far above those required by markets with value-based tariffs and, until the autumn of 1974 when there was a sharp drop in cattle prices, requests for changes in rates from markets with value-based tariffs were infrequent (T. 42).

Because of the many requests for rate changes by markets with value-based tariffs in the autumn of 1974, P&SA implemented a policy effective February 1, 1975, of denying any request that would thereafter continue to employ a value-based tariff in any form (T. 69).

14. In the instant proceedings, based upon the evidence of record, it is found that value-based tariffs are only coincidentally related to each respondent's revenue requirements, and impose differing charges upon individual rate payers not related to the cost of the services rendered.

Analysis of Respondents' Revenue Requirements

15. It is customary in proceedings of this kind to select a representative past period for the purpose of analyzing the revenue requirements that future rates and charges should reasonably anticipate. The latest data on file with P&SA at the time of the hearings consisted of the annual report that each respondent had filed in April of 1975 itemizing its revenues and expenses for the calendar year of 1974. Reports on file for prior years indicate that the expense data furnished for 1974 is representative of each respondent's current revenue requirements and is therefore selected for analysis (Exs. 5-23).

16. It is also customary in proceedings of this kind to accept the expense data furnished by an applicant as correct except as an individual item either appears excessive requiring the substitution of an amount determined to be reasonable, or is of a type which should be totally excluded or replaced by an allowance for purposes of uniformity.

17. The expenses incurred by respondents during the 1974 test year which are unchallenged, are:

Central Arkansas—$37,526

Major Lewis—$146,731

Atkins—$40,374

Cleburne County—$27,834

18. To these unchallenged sums must be added:

a) Any other item of expense found to be reasonable and appropriate to the market's cost of providing stockyard services which should include reimbursement for the reasonable cost of getting and maintaining business and the incurrence of bad debts;

b) Compensation to the market's owner(s) for services performed as the market's manager and any other work performed by the owner(s) reasonably required to furnish stockyard services.

c) A reasonable return on the present value of land, used and useful for rendering stockyard services; and

d) A reasonable return on buildings and equipment at their original cost less accrued depreciation.

19. Complainant would add to the unchallenged expenses amounts determined by a series of allowances it has formulated. These allowances are principally dependent upon a study of unaudited reports filed by 244 sample markets for the year 1972 which statistically is of sufficient size to be a reliable sample, consisting of every eighth market of the 1,891 markets then regulated. Some of the allowances are based on more remote data; for instance, a number of land appraisals made in the early 1960's.

The formulated allowances include compensation for work personally performed by a working owner/operator; allowance for bad debts; allowance for business getting and maintaining expenses (market support, advertising, travel,

auto expenses, solicitor's salaries and entertainment); allowances for owner's management and interest on working capital; allowance for operating margin; and an allowance for use of land. A return on buildings and equipment is also allowed by P&SA but not on a formulated basis. In formulating its allowances, P&SA has utilized the marketing unit concept both to facilitate comparisons of the cost experiences at sample markets and to develop formula susceptible to universal application. The latter is accomplished by determining the total marketing units that the market under analysis is likely to annually sell for its consignors, and applying the following allowances formulated with some variations, as cents per unit:

a) *Allowance for Work Performed by Owners/Officers*

50 cents per unit for the first 20,000 units plus

25 cents per unit for the next 20,000 units plus

5 cents per unit for all units in excess of 40,000 units

The 20,000-40,000 differentiation was derived from *In re Market Agencies at Sioux City Stock Yards*, 9 A.D. 4, 92 (1950) which found that based upon evidence of the number of head of cattle and calves sold and bought during the year 1947 by salesmen at the various market agencies operating at the Sioux City terminal stockyard, it was not unreasonable to expect that a reasonably efficient salesman would sell 20,000 head per year and in fact "some salesmen sell double that amount or more." As to the last 5 cents component, complainant advises that it is in the nature of an incentive since it is contemplated that any additional volume over 40,000 units will require the employment of hired labor to perform the same function fulfilled by the owner/officer on sale day (T. 32-33). This formula has been used by P&SA since 1969 (T. 444-445).

b) *Bad Debts*

The formula for this allowance is .0003 times the gross value of livestock sold by the market under analysis during the applicable base period.

The factor of .0003 was derived from a review of all auction market bad debt losses incurred in 1965 and 1966 (T. 25-26). P&SA has also reviewed bad debt losses reported in 1972, 1973 and 1974, and has concluded that the .0003 factor continues to appear to be appropriate (T. 26).

c) *Business Getting and Maintaining*

P&SA would allow a market 25 cents a unit whenever this results in a sum less than the market's actual expenditures for market support, advertising, travel, auto expenses, soliciting, salaries and entertainment.

The selection of 25 cents as an appropriate allowance has not been explained by complainant. The dissertation (Ex. 72, p. 83) states that the largest of the sample markets reported 35 cents per unit which in turn was 8 cents per unit or nearly 20 percent less than reported by the average size sample market.

d) *Management and Interest on Working Capital*

6.25 cents per unit for management plus 1.25 cents per unit for interest on working capital.

The 6.25 cent figure was originally found to represent the appropriate per head amount to be included within rates fixed for market agencies at a terminal stockyard on account of management in *Sioux City Stock Yards, supra,* at 99, and has continued to be allowed any market without a salaried manager; otherwise, nothing is allowed additional to the managerial employee's actual salary.

The wellspring of the 1.25 cent figure for interest on working capital has not been explained by complainant except that it was fashioned to recognize that, although this is basically a cash business with payments made within 24 hours of sales, some working capital is required to purchase inventories of business forms, animal feed, etc. (T. 35-36). It is not allowed when on audit, it is determined that it is inappropriate to the given market (T. 37).

e) *Margin*

40 cents per unit is allowed as a margin to cover contingencies.

The rationale for including such an allowance was expressed in *Sioux City Stock Yards, supra,* at page 109:

> ". . . to provide a cushion which can absorb a decline in volume of receipts and for other contingencies . . . While rates are not prescribed in perpetuity, it is not desirable that they be changed with too great frequency. The inclusion of a margin makes it possible for the agencies to establish reserves against a decline in volume and other contingencies, and so to make for rate stability."

The figure used in *Sioux City Stock Yards* was 11.95 cents, or 14 percent of average revenues of 93.95 cents; P&SA found that 14 percent produced an average margin per marketing unit of 38.32 cents (rounded off to 40 cents) for the markets sampled in Exhibit 72. Among the contingencies P&SA would include under this allowance, in addition to fluctuations in livestock receipts, are errors and omissions, and income tax liability of a corporate market agency paying separate income taxes. Anything remaining after contingencies would be considered by P&SA to constitute an element of profit (T. 37-38, T. 181).

f) *Allowance for Use of Land*

Based on land appraisals made in the early 1960's, 6 cents per unit has been provided since 1968 as an allowance for land used by the stockyard (T. 29-30).

Major Lewis d/b/a Major Lewis Livestock Auction Sales

Revenue Requirements and Reasonable Rates and Charges

20. The total expenses respondent Major Lewis claimed for the 1974 test year (Ex. 5) amount to $225,249, of which the following are unchallenged:

Salaries and bonuses paid employees	—$	64,449.55
Federal and State Unemployment Insurance	—	662.91
Other insurance	—	8,649.99
Telephone and other utilities	—	4,548.53
Taxes other than income	—	4,422.27
Rent	—	38,076.00
Depreciation on trucks	—	2,417.93
Repairs and maintenance	—	9,921.68
Office and yard supplies	—	5,555.05
Bank charges	—	799.64
Laundry	—	45.08
Auctioneer	—	7,182.00
TOTAL		$146,730.63

21. In addition, $1,838.02 is shown on the 1974 report as having been expended on legal and accounting fees. Complainant has urged that this item be disallowed, but has failed to specifically demonstrate its impropriety. Legal and accounting fees are permitted if normal and incidental to the business, including, for example, legal fees that may reasonably be incurred in ratemaking proceedings such as

these. *In re Market Agencies at Sioux City Stock Yards*, 9 AD 4, 84-85 (1950). Therefore, in the absence of countervailing evidence, the $1,838.02 item is found to be proper and is allowed.

22. Respondent Major Lewis would include outlays made in behalf of individual consignors which are not usual incidents to the stockyard services customarily furnished by the market. The outlays are for veterinary supplies ($5,041.51) and for feed ($9,314.00) for which the individual consignors in whose behalf these sums were expended may be charged amounts, if specified in the tariff, additional to the tariff's general commission rate. P&SA therefore concluded, and it is found that in determining the proper level of respondent's general rate of commission these sums are not reflective of costs to be borne by all of its rate payers and are excluded from consideration of the market's general revenue requirements.

23. The report for 1974 claimed that the total depreciated value of fixed assets used for stockyard purposes as of April 15, 1975 was $19,571.17. No claim was made for "salaries and bonuses of owners or officers" in the space provided in the printed form as completed by respondent (Ex. 5, p. 4) which was also true for the completed forms filed for 1969 (Ex. 9), 1970 (Ex. 10), 1971 (Ex. 11), 1972 (Ex. 12), and 1973 (Ex. 13). The remaining expenses listed on the report for 1974, which P&SA has in its analysis replaced by allowances, consists of:

Loss on market support activities	—$	52,156.42
Advertising	—	1,627.40
Interest	—	8,262.00
Refunds	—	279.00
TOTAL		$62,324.82

24. Complainant in its analysis, has substituted in place of the items listed in finding 23, *supra*, the following allowances which it contends are more appropriate (Ex. 29):

Compensation for working owner	—$16,758
Allowances for owner's management and interest on working capital	— 5,637
Allowances for business getting and maintaining	— 18,791
Allowances for bad debts	— 2,931
Return on buildings and equipment	— 1,957
Allowance for operating margin	— 30,066
TOTAL	$76,140

25. It is found that 10% is the appropriate rate of return on the value of property utilized by respondent's auction market. Therefore, if the $225,249 of expenses respondent has claimed were allowed, less the $14,355 claimed for veterinary and feed expenses which may not be the basis of the general tariff rate, then $1,957 should be added as a reasonable return on its building and equipment at their original cost less accrued depreciation, resulting in a total of $212,851. Nothing else may be added. Respondent leases the land on which the market is located and therefore is not entitled to a return on the land's value. Respondent has not listed or sought in his reports any sum in compensation for services he may personally provide to the market in its management or otherwise, and did not take the stand to clarify this omission. However, the $62,324.82 respondent claimed for market support, advertising, interest and refunds represents losses and expenditures he was not required to sustain, and this amount is found to be adequate to provide respondent with

compensation for the personal services he renders in behalf of consignors and a return on his capital investment equivalent to his reasonable requirements.

On the other hand, complainant's analysis would indicate a total revenue requirement of $222,871 which exceeds by $10,020 the amount that results through the basic acceptance of the amounts respondent claimed for the test year and this amount is found to be the market's reasonable annual revenue requirement.

26. It is found that during the predictable future, the market operated by Major Lewis will reasonably require $222,871, annually, for stockyard services that will be furnished consignors of approximately 75,000 marketing units of livestock it is anticipated will be consigned each year to this market. This necessitates an average minimum and maximum selling-yardage charge of $2.97 (rounded to $3.00) per marketing unit. In other words, $3.00 per head of cattle including calves; $6.00 per horse or mule; $1.00 per hog; and $.75 per sheep or goat.

Further apportionment of these charges among consignors, in recognition of the different weights and the sex of their animals and whether they consign animals to be sold as "pairs" as requested by complainant, is not possible based upon the present evidence of record.

In addition to the general selling-yardage charges, respondent should be permitted to charge consignors for feed and veterinary services supplied in their individual behalf as follows:

a) For feed at the average monthly cost F.O.B. the market plus $0.005 per lb. or $0.50 per cwt.

b) For veterinary services performed by an accredited veterinarian at posted uniform per head rates in accordance with an agreement between respondent and the

veterinarian performing such services which shall not include any charges retained and not actually paid by respondent.

In addition, it is found that in respect to "resales" (livestock resold without leaving the market premises) and "no-sales" (a consignor declared his consignment no-sale on price bid, bids in his consignment, or withdraws the same prior to actual sale), one-half of the regular selling-yardage charges should be assessed.

It is also found that respondent should be permitted to vary its charges, under special arrangements agreed to in advance with the consignor, for special sales or unusual stockyard services such as are included in featured registered cattle and calf sales, annual 4-H sales, and sales for one consignor sold on other than regular sale days which require special services and handling.

Central Arkansas Auction Sales, Inc.

Revenue Requirements and Reasonable Rates and Charges

27. Respondent, Central Arkansas Auction Sales, Inc., a corporation, which on June 9, 1974, replaced a partnership structure, reported and claimed total expenses for the 1974 test year of $60,906, (Ex. 6), of which the following are unchallenged:

Salaries and bonuses to employees	—$20,849.49
Federal and State Unemployment Insurance	— 642.50
Other insurance	— 889.00
Telephone and other utilities	— 1,933.64
Licenses and bond premiums	— 350.00
Taxes, other than income	— 1,592.20
Legal and accounting fees	— 110.00
Depreciation	— 1,577.46
Office and yard supplies	— 4,098.82

Respondent also claimed $9,482.39 for repair and maintenance of buildings, structures and equipment, $4,000.00 of which complainant would disallow, wherein the total unchallenged expenses equal $37,526.

28. The P&SA challenge to $4,000 of the reported repair and maintenance expenses is on the ground that this portion is believed to represent capital improvements (T. 334), but since the P&SA challenge is based neither upon an audit of respondents' records nor upon an inspection of the market's physical structure, being an estimate only, this $4,000 amount has not been found to be improper and is therefore restored.

29. Respondent claimed $130 for charitable contributions which P&SA would disallow on the ground that it is not reasonable that rate payers make involuntary donations to charities not of their choice (T. 27). However, the policy expressed in prior proceedings has been to include those gifts and donations which tend to improve the morale of workers or to promote harmonious employer-employee relationships and to exclude all those of a general nature which benefit the communities in which the respondent resides. *In re Market Agencies at Sioux City Stock Yards, supra,* 83. It may well be that the claimed donations should be disallowed under this test, but without evidence resulting from an audit, or an investigation of any kind, this is uncertain and therefore this item is likewise restored.

30. The remaining items complainant did not accept at face value are $13,355 by way of owner's compensation, $33 for bad debts and $5,862 for market support. No claim was made that the corporate respondent paid income taxes either prior or subsequent to its total distribution of profits through salaries, dividends and otherwise.

31. Complainant would provide for the items listed in finding 30, *supra*, as part of the following allowances (Ex. 35):

Compensation for working owner	—$ 8,612
Allowance for owner's management and interest on working capital	— 1,292
Allowance for business getting and maintaining	— 4,306
Allowance for bad debts	— 660
Allowance for use of land	— 1,033
Return on buildings and equipment	— 2,754
Allowance for operating margin	— 6,890
TOTAL	$25,547

32. Respondent has claimed the depreciated value of buildings and equipment is $27,922.39 and that the land employed by the market is worth $5,400.

Accordingly, the $2,754 that P&SA would allow as a return on buildings and equipment is the equivalent of a 10% rate; which is found to be reasonable. The $1,033 complainant would furnish respondent as a return on its land is equivalent to 20% and would be excessive; the reasonable rate would again appear to be 10%.

33. It is found that respondent's reasonable annual revenue requirements are $60,906, the sum reported and claimed in its report for 1974, plus a 10% return on the present worth of its land and buildings or $3,294, which together total $64,200 and which exceeds the $63,073 allowed, under the methodology employed in complainant's analysis, by just over $1,000.

34. It is found that during the predictable future, the market operated by Central Arkansas Auction Sales,

Inc., will reasonably require $64,200 annually, for the stockyard services that will be furnished consignors of the approximately 17,200 marketing units of livestock it is anticipated will be consigned each year to this market. This necessitates an average minimum and maximum selling-yardage charge of $3.73 (rounded to $3.75) per marketing unit. In other words, $3.75 per head of cattle including calves; $7.50 per horse or mule; $1.25 per hog; and $.94 per sheep or goat.

Further apportionment of these charges among consignors, in recognition of the different weights and the sex of their animals and whether they consign animals to be sold as "pairs" as requested by complainant, is not possible based upon the present evidence of record.

In addition to the general selling-yardage charges, respondent should be permitted to charge consignors for feed and veterinary services supplied in their individual behalf as follows:

a) For feed at the average monthly cost F.O.B. the market plus $0.005 per lb. or $0.50 per cwt.

b) For veterinary services performed by an accredited veterinarian at posted uniform per head rates in accordance with an agreement between respondent and the veterinarian performing such services which shall not include any charges retained and not actually paid by respondent.

In addition, it is found that in respect to "resales" (livestock resold without leaving the market premises) and "no-sales" (a consignor declared his consignment no-sale or price bid, bids in his consignment, or withdraws the same prior to actual sale), one-half of the regular selling-yardage charges should be assessed.

It is also found that respondent should be permitted to vary its charges, under special arrangements agreed to in advance with the consignor, for special sales or unusual stockyard services such as are included in featured registered cattle and calf sales, annual 4-H sales, and sales for one consignor sold on other than regular sale days which require special services and handling.

Travis McGee, d/b/a Atkins Livestock Auction

Revenue Requirements and Reasonable Rates and Charges

35. Respondent Travis McGee d/b/a Atkins Livestock Auction, reported and claimed (Ex. 7) total expenses for the 1974 test year of $66,978 of which the following are unchallenged:

Salaries and bonuses paid employees	$26,095.85
Federal and State Unemployment Insurance—	334.00
Other insurance	— 2,066.50
Telephone and other utilities	— 1,082.14
Licenses and bond premiums	— 300.00
Taxes, other than income taxes	— 1,569.99
Legal and accounting fees	— 605.00
Depreciation on buildings and structures	— 2,064.00
Repairs and maintenance of buildings and equipment	— 501.72
Office and yard supplies	— 2,693.10
Auctioneer	— 2,903.00
Test scales	— 158.55
TOTAL	$40,373.85

36. Respondent also claimed $337 for veterinary medicine and has introduced testimony that the medicine was supplied to "caught cattle" (cattle purchased by the market itself to maintain a level of prices to its consignors higher than those otherwise bid). Complainant had supposed that the medicine was furnished instead to cattle still titled to individual consignors for which charges would not be properly included as part of the general tariff rate base but would be instead the subject of and reimbursable through other tariff provisions. In light of the evidence (T. 531-533), this supposition was erroneous and the amount is allowed.

37. Respondent claimed he expended $380 in 1974 for advertising, and that he lost $25,887 on market support activities wherein he sold "caught livestock" for that much less than the net amounts, after the deduction of commissions, he remitted to the consignors.

Complainant would substitute for these items the following allowances (Ex. 38):

Compensation for working owner	—$ 8,677
Allowance for owner's management and interest on working capital	— 1,302
Allowance for business getting and maintaining	— 4,339
Allowance for bad debts	— 621
Allowance for use of land	— 1,041
Return on buildings and equipment	— 886
Allowance for operating margin	— 6,942
TOTAL	$23,808

38. Respondent has not indicated the present value of land used and useful to the stockyard services furnished

by the market. It appears that he does not pay rent but without some evidence by respondent indicating land value, this element cannot be included in fairness to rate payers.

Respondent has claimed that the depreciated value of his buildings and equipment is $8,859.60 with an original worth of $20,385.00. The $886 P&SA would allow as a return on buildings and equipment is the equivalent of a 10% rate of return on their present worth which is found to be reasonable and appropriate.

39. It is found that respondent's reasonable revenue requirements are as specified in his report for the 1974 test year, or $66,978 plus $886 as a 10% return on the present worth of his buildings and equipment, which totals $67,864. This exceeds by $3,682, the $64,182 P&SA has concluded is reasonable; a difference which is not sufficiently substantial to require rejection of the data provided by respondent.

40. It is found that during the predictable future, the market operated by Travis McGee will reasonably require $67,864 annually, for the stockyard services that will be furnished consignors of approximately 17,400 marketing units of livestock it is anticipated will be consigned each year to this market. This necessitates an average minimum and maximum selling-yardage charge of $3.90 per marketing unit. In other words, $3.90 per head of cattle including calves; $7.80 per horse or mule; $1.30 per hog; and $.98 per sheep or goat.

Further apportionment of these charges among consignors, in recognition of the different weights and the sex of their animals and whether they consign animals to be sold as "pairs" as requested by complainant, is not possible based upon the present evidence of record.

In addition to the general selling-yardage charges, respondent should be permitted to charge consignors for feed and veterinary services supplied in their individual behalf as follows:

a) For feed at the average monthly cost F.O.B. the market plus $0.005 per lb. or $0.50 per cwt.

b) For veterinary services performed by an accredited veterinarian at posted uniform per head rates in accordance with an agreement between respondent and the veterinarian performing such services which shall not include any charges retained and not actually paid by respondent.

In addition, it is found that in respect to "resales" (livestock resold without leaving the market premises) and "no-sales" (a consignor declares his consignment no-sale on price bid, bids in his consignment, or withdraws the same prior to actual sale), one-half of the regular selling-yardage charges should be assessed.

It is also found that respondent should be permitted to vary its charges, under special arrangements agreed to in advance with the consignor, for special sales or unusual stockyard services such as are included in featured registered cattle and calf sales, annual 4-H sales, and sales for one consignor sold on other than regular sale days which require special services and handling.

Bill Rice and Lois Rice, d/b/a Cleburne County Auction Sale

Revenue Requirements and Reasonable Rates and Charges

41. The evidence of record is insufficient to establish the reasonable revenue requirements of these respondents.

Respondents' report for 1974 (Ex. 8) shows ownership of 80 acres of land worth $40,000; and buildings, structures and equipment originally worth $112,925 with a depreciated value of $94,380.19. Testimony by Lois Rice indicated that the market rents its pasture land and the principal value of the land it owns is as a future lakeside development which respondents plan to subdivide some day (T. 567). In these circumstances, to attempt to determine the proper return to which the market is entitled on such property without the benefit of appraisals by appropriate experts, would be arbitrary and unfair to both the market and to rate payers.

Mrs. Rice further admitted that the expenses reported may have included items attributable to dealer activities, and that commissions were not charged and included in the revenues of the market on cattle they bought themselves as dealers. In light of this testimony, the proper level of the market's revenue requirements cannot be made without an audit of respondent's records to assure requisite accuracy.

Accordingly, no findings on the revenue requirements of these respondents are presently included.

42. The present inadequacy of record evidence further precludes the inclusion of a finding as to the proper charge per marketing unit that should henceforth be observed by respondents Bill and Lois Rice d/b/a Cleburne County Auction Sale.

Economic Consequences of the Prescribed Rates and Charges

43. The economic impact upon respondents and upon rate payers that will result from the prescribed rates and charges has been considered and it is found that the differences between those prescribed and those prevalent at competing markets are not sufficient in light of added transportation costs to encourage any rate payer to shift business away from any of the respondents' markets.

44. Rate payers patronizing each of the respondent's markets for which new rates and charges have been prescribed will be directly benefited in that they will be charged in direct proportion to the cost of the stockyard services they are furnished which heretofore has not been the case.

45. The tariffs which have been prescribed come within the $2.50 to $4.00 range which is found to presently constitute the zone of reasonableness for auction market tariffs. That is to say, the range which fully compensates auction markets for the value of the stockyard services they render to their patrons without exceeding their worth and constitutes a range of charges which in general are neither so low nor so high as to constitute unfair competition to other markets.

46. The prescribed rates and charges will not adversely affect consumers. As previously found, the effect of the rates and charges by auction markets upon beef prices is insignificant. The number of hogs and sheep that are consigned to these markets is minimal. The impact on veal prices, however, has been studied in detail and it is found that, based upon Exhibit 69 which lists Livestock Detailed Quotations (annual), calf prices ranged in 1975 from a low of $20.24 per cwt. to a high of $27.45 per cwt. A standard 205 lb. calf could have sold for as little as $20.24 per cwt. or $41 total and a choice 500 lb. calf could have sold for as much as $27.45 per cwt. or $138 total which results in a $90 simple average.

Accordingly, a 3% tariff results in charges of $1.23 on a $41 sale; $2.70 on a $90 sale; and $4.14 on a $138 sale. A 4% tariff results in charges of $1.64 on a $41 sale; $3.60 on a $90 sale; and $5.52 on a $138 sale. It is found, therefore, that the $3 per head charge prescribed for the market operated by Major Lewis and the $3.75 and $3.90 charges for the markets operated by Central Arkansas Auction Sales, Inc., and Travis McGee, respectively, should not have detrimental effects on veal prices in that neither the gross purchase prices nor the net proceeds after commissions on calf sales should be significantly different from those which have been obtained under the value-based tariffs that have been in effect.

Conclusions

I. *The Ratemaking Provision of the Act as Interpreted by the Supreme Court and Applied by the Secretary*

A. *Supreme Court Decisions*

The ratemaking provisions of the Act have been the object of close judicial scrutiny culminating in nine decisions by the Supreme Court which include several considered to be of landmark importance in the development of administrative law. The first decision by the Supreme Court was in 1922; the last in 1941.

During that period, livestock was customarily hauled by rail to the great terminal markets, such as those in Chicago and Kansas City, where various commission men (market agencies) operating at the stockyards imposed charges for undertaking to sell the livestock to dealers or packing houses; the charges of these commission men were separate and apart from the charges by the stockyard owners for feeding and otherwise maintaining the animals while awaiting sale. This separation in the performance

of stockyard services resulted in two distinct sets of rates applicable at the stockyards, and produced a duality of standards applicable upon review of rates fixed by the Secretary. When rates designed to compensate stockyard owners for their large capital investments were before the Court, its principal concern was whether the rates violated the due process clause as being "confiscatory". In those instances when the Supreme Court considered the Secretary's fixing of rates for market agencies, it commented upon the necessity of the rates being "reasonable" and not "exorbitant" and held that inasmuch as market agencies primarily furnish personal services rather than the use of property, the Fifth Amendment proscription against confiscatory rates was inapplicable. In addition to whether the Secretary had fixed a rate that was not confiscatory and would yield revenues at the level contemplated by the Act, the principal concern expressed by the Supreme Court was whether the Secretary had afforded a "full" and a "fair" hearing in arriving at the rate. The decisions, in chronological sequence, are:

a) *Stafford* v. *Wallace*, 258 U.S. 495 (1922), in which the Court held the Act to be constitutional concluding, at page 516, that it treated "the various stockyards of the country as great national public utilities . . . affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. That has been settled since the case of *Munn* v. *Illinois*, 94 U.S. 113." Following a lengthy review of the Act's legislative history and the practices it sought to curtail, the Court stated at pages 514 and 515:

> The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily

to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. *Another evil which it sought to provide against by the act, was exorbitant charges,* duplication of commissions, deceptive practices in respect of prices, in the passage of the live stock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. *Expense incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate.* Any unjust or deceptive practice or combination that unduly and directly enhances them is an unjust obstruction to that commerce. The shipper whose live stock are being cared for and sold in the stockyards market is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men. The packers and their agents and the dealers who are the buyers, are at the elbow of the commission men, and their relations are constant and close. The control that the packers have had in the stockyards by reason of ownership and constant use, the relation of landlord and tenant between the stockyards owner, on the one hand, and the commission men and the dealers, on the other, the power of assignment of pens and other facilities by that owner to commission men and dealers, all create a situation full of opportunity and temptation to the prejudice of the absent shipper and owner in the neglect of the live stock, in the *mala fides* of the sale, in the exorbitant prices obtained, in the unreasonableness of the charges for services rendered. (emphasis supplied)

b) In 1929, the Supreme Court examined the Act a second time, *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, and considered the implications involved in the furnishing of stockyard services at terminal markets on a divided basis in light of a challenge by market agencies at the Omaha stockyards, that Congress had not intended to confer upon the Secretary the power to prescribe their charges. In deciding that Congress had not limited the powers conferred upon the Secretary to fix charges for stockyard services to those directly provided by stockyard owners, Justice Brandeis stated:

> The contention that Congress did not purport to empower the Secretary to issue an order prescribing the charges of market agencies is without substance. The language used was apt to confer the power. The committee of the House declared in terms that it did so, when it reported the bill. The executive department charged with the duty of enforcing the act so interpreted it. This court assumed in *Stafford* v. *Wallace*, . . . that the power had been conferred. (At page 435)

* * *

Justice Brandeis then stated in respect to the next contention of the market agencies:

> The contention that the act, if construed as authorizing the order assailed, is void under the due process clause, is likewise unsound. It rests upon the fact that the services for which the Secretary's order fixes the charges are practically the personal services of brokers. Some of the market agencies are corporations; some, partnerships; some are individually owned. The cap-

ital needed in the conduct of their business is small. It is said that the business is wholly one of skill and labor . . . (At pp. 436 and 437)

It is true that performance of the specific work done by the plaintiffs does not require them to invest extensive capital. But it is essential that they employ the valuable property of the stockyards corporation, for which a charge is ultimately made to the shipper or buyer. The mere division of the stockyard services between the stockyards corporation and the market agencies does not deprive Congress of a power of regulation which it otherwise would have had. (At p. 438)

Having thus determined that the Secretary may prescribe rates and charges for all stockyard services regardless of whether provided by the stockyard owner seeking a return on his invested capital or by others whose services are basically personal in nature, the Court then looked to the tariffs prescribed by the Secretary and found ample support for his findings and conclusions which included a finding that rates he replaced had been "unjust, inequitable and not based on reasonable differences in the cost or value of the service performed." (At p. 441)

c) In 1936, the Supreme Court decided four cases involving the Act; *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38; *Acker* v. *United States,* 298 U.S. 426; *U.S.* v. *Corrick,* 298 U.S. 435 and the first of the four landmark *Morgan cases, Morgan* v. *United States* (Morgan I), 298 U.S. 498.

In *St. Joseph Stock Yards Co.,* the Court examined in great detail the principles of ratemaking applicable to the Secretary's prescription of maximum charges to be imposed by a stockyard having a large investment in cap-

ital assets. These principles are reserved for discussion later.

In deciding that the rates imposed by the Secretary were not confiscatory and did not therefore violate the Constitution's Fifth Amendment, the Court placed considerable emphasis upon the fact that a hearing had been held, stating at pages 50-51:

Exercising its ratemaking authority, the legislature has a broad discretion. It may exercise that authority directly or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards . . . When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily.

And again, at page 54:

. . . as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne.

St. Joseph Stock Yards Co., at page 49, also recognized that whether a rate for stockyard services would be construed as confiscatory depended in part on whether it

was principally designed to compensate for personal services or for large capital investments.

In *Acker* v. *United States, supra,* in which the maximum rate for the market agencies at the Chicago Stockyards was at issue, the Court returned to this point of differentiation, stating at page 434:

> It is to be noted that in spite of the allegations of the bill the case does not involve any question of confiscation. The appellants employ little physical property in their business and no complaint is made as to the allowance of interest on such as they do employ. They render a personal service and the issue before the Secretary was whether the uniform schedule of rates for that service was or was not reasonable. On this issue he was bound to afford the appellants due process. In fact he gave them adequate notice and accorded them a full hearing . . . *The issue before the Secretary was not confiscation but the reasonableness of a charge for personal service.* (emphasis supplied)

U.S. v. *Corrick, supra,* involved litigation collateral to *Acker* which the Supreme Court ruled must be dismissed for jurisdictional reasons. The Supreme Court's final 1936 pronouncement on the Act was *Morgan I.*

d) *Morgan I* (298 U.S. 468 (1936)) and *Morgan II* (304 U.S. 1 (1938)) stamped upon many federal agency proceedings in general, and upon ratemaking cases under Title III of the Act in particular, the requirements that there be a "full hearing" and a "fair and open hearing" since such proceedings are "quasi-judicial" requiring that "the one who decides must hear" (Morgan I); and affording a party proceeded against "not only the right to present evidence but also a reasonable opportunity to know the

claims of the opposing party and to meet them." (Morgan II)

Morgan III (307 U.S. 183 (1939)), concerned the duties of the Secretary respecting the disposition of charges impounded for being in excess of the tariffs he had initially approved in the proceedings set aside by *Morgan II.* In 1941, the final Morgan case, *Morgan IV,* 313 U.S. 409, 11 years after the case's origin, approved the manner in which the Secretary had finally discharged his duties, and Justice Frankfurter observed, at page 415:

> When the matter was last here we defined the duty of the Secretary. He was to determine reasonable rates for the impounding period so that there could be just distribution of the funds which the court below had taken into its registry. The nature of the problem before the Secretary was a guide to its solution. The Secretary's task was not the usual enterprise of fixing rates for the future, so largely an exercise in prophecy. Unique circumstances made him, in 1939, the arbiter of rates for a period between 1933 and 1937. But even such a retrospective determination does not present a mathematical problem. Doubts and difficulties incapable of exact resolution confront judgment. More than that, since the Secretary is the guardian of the public interest in regulating a business of public concern it is not for him merely to reflect the items on a profit and loss statement. He must consider whether these represent services which properly should be charged to the public. While, therefore, the Secretary in determining rates for the past could not deny himself the benefit of hindsight, he was not merely a bookkeeper posting items into a ledger. Rates to which these public agencies were entitled were not to be derived merely from their expenditures and actual income.

e) Two days subsequent to *Morgan II*, the Supreme Court decided *Denver Union Stock Yard Co.* v. *U.S.*, 304 U.S. 470 (1938) which constitutes the Supreme Court's second and last enunciation on the standards the Secretary may utilize when fixing rates for stockyards where the sole issue is providing a reasonable rate of return on the value of property being used to provide stockyard services. These standards will be discussed at length, *infra*.

B. *Outline of Decisions by the Secretary Since 1941*

Subsequent to the 1941 decision in *Morgan IV*, the Secretary made further pronouncements on the reasonableness of rates by market agencies and stockyards at terminal markets. The most recent decision pertinent to market agencies operating at terminal markets was issued on January 31, 1950, *In re Market Agencies at the Sioux City Stockyards*, P&S Docket No. 308, 9 A.D. 4. The last pronouncement on rates by terminal stockyards was issued on November 7, 1961, *In re St. Paul Union Stockyards Company*, P&S Docket No. 1211, 21 A.D. 1216.

The first reported decision by the Secretary considering the tariff of a livestock auction market was issued in 1942, *Secretary of Agriculture* v. *Norfolk Horse and Mule Commission Sales Company*, 1 A.D. 372. It was followed by *Secretary of Agriculture* v. *H. L. Bowman*, 1 A.D. 425 (1942) and *In re Foust-Yarnell Stock Yards*, 4 A.D. 826 (1945). There then followed a 31 year period of silence until the most recent pronouncement on tariffs by livestock auction markets, *In re Giles Lowery Stockyards*, 35 A.D. 267, decided on March 26, 1976, presently on appeal to the United States Court of Appeals for the Fifth Circuit, Case No. 76-2462.

C. *Fixing Rates for Terminal Stockyards Owner*

The principal concern in fixing rates for a terminal stockyards owner is providing a net income which yields a fair return on the fair value of the stockyard's property and working capital devoted to stockyard services. But, to accomplish this "involves a whole host of subsidiary issues relating to such matters as used and useful property and the valuation thereof, working capital, rate of return, depreciation, repairs, expenses, volume of livestock, and the proportionate share each specie of livestock and related services should contribute to the revenues (required) . . ." *In re St. Paul Union Stockyards Co.*, 21 A.D. 1216, at 1124.

a) *The rate base.*

To establish the rate base, the Secretary in the cited case, acting by and through his Judicial Officer, followed the procedure approved in *St. Joseph Stock Yard Co.* v. *U.S., supra*, and *Denver Stock Yard Co.* v. *U.S., supra*, and ascertained:

1. *The present value of land*, used and useful for rendering stockyard services, as if it were:

> bare land, filled in, graded, and in its present condition insofar as topography is concerned but without improvements, and merely available for various uses and purposes. The land must be appraised for its highest and best use. Consideration should be given to the element of plottage, but this factor must be weighed against the effect of the necessity for breaking up the areas to determine their values for alternative uses and purposes. Consideration of these factors may result in the conclusion that for stockyard use the values should be higher than for other uses or purposes. (Ibid., pp. 1235-1236)

This accords with the criteria held to be applicable in *St. Joseph Stockyards Co.* v. *U.S.*, 298 U.S. 38, 56-60 (1936), but the last quoted sentence must be read in conjunction with the Supreme Court's admonition that although a stockyard:

> was entitled to be allowed in the fixing of its rates the fair market value of its land for all available uses and purposes, which would include any element of value that it might have by reason of special adaptation to particular uses. But it was not entitled to an increase over that fair market value by virtue of the public use . . . (Ibid., p. 59)

It also accords with *Denver Union Stock Yard Co.* v. *United States*, 304 U.S. 470, 475-477 (1938) which excluded from the rate base land determined to be neither used nor useful for the rendering of stockyard services, and further held that there was no need to add a separate amount to the rate base to cover so-called "going concern value." (Ibid., pp. 478-481)

2. *Interest on Land During Construction. St. Paul Union* then added to the value of the land as incorporated in the rate base, an allowance for interest during the period when the land was held during which construction of facilities took place, computed at the nominal rate of six percent for a period of two years (Ibid., pp. 1237-1238).

3. *Valuation of Structures.* The next item included in the rate base was the valuation of structures. *St. Paul Union* pointed out that various methods had been used in the past and that three different methods, complainant's, respondent's and the hearing examiner's, had been urged upon the Judicial Officer who concluded that no one rate-making formula was sacrosanct in light of *Federal Power*

Commission v. *Natural Gas Pipeline Company of America*, 315 U.S. 575 (1942), and *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), whereby "a new era of ratemaking was introduced . . . Under the standard 'just and reasonable' it is the result reached and not the method which is controlling" (Ibid., p. 1242). *St. Paul Union* thereupon rejected the formerly applicable reproduction new method as being "unrealistic, conjectural and speculative. It is unfair to the rate payers and results in fictitious and inflated values" (Ibid., p. 1260). The "trended cost theory" was also rejected as "even more conjectural, speculative, hypothetical, and unrealistic than the reproduction new theory. It has the same basic infirmities as the reproduction new theory, except to a greater degree" (Ibid., p. 1263). The Judicial Officer then agreed with the Hearing Examiner and approved the net capital investment on original cost method of valuation, but did not adopt this formula *in toto* because of the setting of the proceeding which led the Judicial Officer to utilize the "split inventory" method of valuation (a variation of the original cost method). However, the original cost method was adopted in principle wherein structures are valued at their original cost when first dedicated to the public use minus depreciation and property retired. The Judicial Officer explained how this method would be applied in making future adjustments to *St. Paul Union's* rate base:

> The valuation of the depreciable property included in respondent's rate base shall be adjusted from year to year by adding the values of improvements at cost, deducting retirements at appropriate values, and deducting depreciation accruals recorded subsequent to October 31, 1961. (Ibid., p. 287)

4. *Depreciation.* From the value of structures added to the rate base depreciation was deducted to reflect:

> . . . all elements of observed depreciation, such as condition, age, wear and tear, obsolescence within the structures, functional obsolescence due to the arrangement, layout, and design of the stockyards, and expectancy of future life of the various units of property. (Ibid., p. 1272)

5. *Interest on Structures during their construction* was treated as a questionable item, but was allowed and added to the rate base as being consistent with the split inventory theory applied in *St. Paul Union* (Ibid., p. 1286).

6. *The Value of Movables* was next added to the rate base, "on the basis of the asset balance for such property shown in the current corporate property account and depreciated by the balance of the depreciation reserve for movables as shown in the current corporate property records" (Ibid., p. 1287).

7. *Working Capital.* It was recognized that stockyards promptly collect revenues usually in advance of customary outlays, and therefore do not require as much working capital as public utilities such as gas, electric and telephone companies which bill on a monthly basis. The amount stipulated by the parties to be a fair and reasonable allowance was then included in the rate base as the allowance for working capital (Ibid., pp. 1287-1288).

b) *The rate base tested*

Having thus arrived at the rate base, *St. Paul Union* then tested its reasonableness by comparing it with (pp. 1288-1290):

1. *The total capital structure of the stockyard as shown in its corporate books.* This involved deleting from

the book value its investments in subsidiaries, etc. The net sum though not equal, being somewhat lower, approximated the rate base that had been established.

2. *The market value of the corporate stockyard's securities.*

To make this comparison, the highest market value of its outstanding shares of common stock plus bonded indebtedness was used. The value of nonused and useful property was then deducted to arrive at the proportion of the stockyard's securities applicable to its used and useful property. Again the sum was lower than the rate base found in the proceedings.

3. *The remaining value of the stockyard's buildings* with improvements, and movables was added to the value of used and useful value and the working capital allowance. This too was a sum less than the rate base established in the proceedings.

C. *Rate of Return*

The rate base, thus established and tested, was then subjected to a rate of return. *St. Paul Union* rejected proposed rates of 9% to 9.5% (the stockyard's), 6.5% (P&SA's) and 7.5% (the Hearing Examiner's) and instead utilized a rate of 7.75%. In so deciding, the Judicial Officer stated, at page 1291:

> The Supreme Court, in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), has stated succinctly our obligations to the investor interest in fixing just and reasonable rates, as follows (p. 603): '[T]he investor interest has a legitimate concern with financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue

not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. *Cf. Chicago & Grand Trunk Ry. Co.* v. *Wellman*, 143 U.S. 339, 345-46. By that standard the return to the equity owners should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. See *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Commission*, 262 U.S. 276, 291 (Mr. Justice Brandeis concurring).' (emphasis supplied)

128. We believe we shall discharge our obligations to the investor and treat the rate payer fairly if we provide revenues sufficient for the company to pay (a) its actual operating expenses prudently and economically incurred; (b) an annual charge for depreciation based upon the expected life of the properties; (c) taxes; (d) interest on its debt at the rate actually paid; (e) a reasonable dividend on its outstanding stock; and (f) something to be added to the surplus to enable the company, under good management, to maintain and support its credit.

d) *General operating expenses, depreciation and allowance for income taxes*

The stockyard was then given an "allowance for its operating expenses prudently and economically incurred"; plus annual "depreciation on all . . . buildings and improvements found to be used and useful for rendition of stockyard services," plus annual depreciation on movables plus an allowance for Federal and State income taxes. The totals for each of these, which were in large part stipulated,

were added in *St. Paul Union* to the fair return on rate base, as previously found, to arrive at the stockyard's total revenue requirements (Ibid., pp. 1303-1306).

e) *Anticipated revenue.* Future volume of livestock to be handled was next estimated, with all of the risks attendant upon such a prediction, to compute and compare the stockyard's current and proposed rates. A revenue schedule was then constructed which "incorporates such modifications of the current schedule and the rates prescribed therein (as) are just and reasonable and are the rates and charges which respondent should assess for its services and the use of its facilities" (Ibid., p. 1316).

D. *Fixing Rates for Market Agencies at Terminal Markets*

The most recent pronouncement on the standards applicable to fixing rates for market agencies operating at a large terminal market is *In re Market Agencies at the Sioux City Stockyards*, P&S Docket No. 308, 9 A.D. 4 (1950).

As disclosed by the findings, consignors of cattle to the Sioux City Stockyards usually contracted with one of 25 market agencies (commission men) who operated at the stockyard. The selected market agency then handled all arrangements in accordance with any special instructions by the consignor. It would deduct from sale proceeds obtained for a consignor, in addition to its own fees and charges as set by posted tariff, the yardage charges which it remitted directly to the stockyard owner.

To prepare its tariff recommendations in the proceeding, P&SA, pursuant to a stipulation, had made cost studies of 12 market agencies selected as typical and representative of the 25 operating at the stockyard.

The affected market agencies had proposed rates based upon their aggregate cost of providing stockyard services. Instead P&SA proposed, and the Judicial Officer found, that in this proceeding as in prior proceedings the "unit cost" approach was the proper method to be applied. The Judicial Officer justified his decision in this respect, thusly (p. 62):

> . . . there is the necessity here of fixing one rate schedule for a group of individual firms rather than a schedule for a single utility. The operating conditions of the firms vary widely. Under respondents' methods, actual costs incurred by all are covered into the rates but since the rates must be uniform as to all, the rate for an individual firm is not based upon the actual costs of that individual firm but upon the average costs of the group.

The Judicial Officer instead applied the "unit cost" method which had been followed in prior market agency ratemaking proceedings. Under this method:

> The operating expenses of the market agencies are divided into a number of categories. The actual unit cost of each of the firms, or a representative number, for each category is ascertained for each species (of livestock handled). From an examination of these actual costs in light of the operating conditions of the firms, a "reasonable" unit cost is determined. (Ibid., p. 61)

The categories into which the expenses of the market agencies were divided were (p. 79):

1. Yarding Salaries and Yard Expenses
2. Office Salaries and Expenses
3. Administrative and General Expenses

4. Business Getting and Maintaining
5. Salesmanship
6. Return on Capital
7. Profit to Cover Management and Uninsurable Risks of the Business

Expenses were then examined category-by-category and total costs were allocated between cattle, hogs and sheep as generated by each species. The examination included a review of actual per head costs for each market agency as allocated among the three species of livestock, in which the costs of some market agencies were found too low and others too high to be representative. Thereupon, a per head amount for each of the three species was determined as fair and reasonable for that category (Ibid., pp. 75-99).

A total for the categorized expenses was then computed for each species of livestock representing the total per head amount to be covered into rates (Ibid., p. 99).

In addition to the cost of the services provided by the market agencies the Judicial Officer gave recognition to the value of the services in two ways:

> . . . Cattle generally sell for more than other species and carry the highest per head rates. Calves which generally sell for less than cattle but for more than hogs carry a rate higher than hogs but less than cattle. Sheep which generally sell for the least carry the lowest per head rate. The value of the service rendered by the agencies to their patrons at the present time has also been given recognition in that the rates hereinafter prescribed are higher than they would have been on the basis of the same per head costs if prices of livestock were lower. (Ibid., pp. 99-100)

In respect to the tariffs applicable to cattle, a schedule of charges was fixed on a per head basis. In so doing, the Judicial Officer rejected a "flexible tariff" proposed by the market agencies which would have employed a percentage commission with per head amounts specified as upper and lower limits on the charges; i.e., the percentage would have only been operable if less than the maximum and more than the minimum per head charge specified.

The arguments supportive of a flexible tariff parallel those of the respondents in the instant proceedings, and were rejected in 1950 on the basis that further research was needed to determine if commission on a percentage plan was sufficiently correlated with costs to be reasonable to rate payers:

> Respondents point out that flexible tariffs, such as they propose, are in widespread use in the livestock industry. Witness Ashby testified that some 20 federally supervised auction markets in the Sioux City market area operate on a graduated commission rate basis; that 19 of such markets are on a partial percentage or flexible basis in that 15 have commission charges that vary according to the weights of the livestock sold; that at 14 markets rates vary according to the sales price; and that some markets use a combination of percentage and headage rates. There is no doubt that such is the case.
>
> Respondents also offered evidence to show that it is a common practice in the case of the sale of other commodities for the sales agent to receive his reimbursement on a percentage basis. For example, the selling charges on the Sioux City Grain Exchange for the sale of corn is one percent of the selling price, with a minimum of one cent per bushel and a maximum of two cents per bushel. Additional charges for inspection and weighing are assessed against the shipper. Similarly, selling charges are assessed on a percentage basis in connection with the sale of tobacco, fruits and vegetables, fluid milk, hides, pork, lard, meat and grains. Also, the same type of charge is assessed by brokerage houses in connection with the selling of securities on the New York Stock Exchange.

Efforts in the direction of getting flexibility into tariffs as distinguished from flat charges per head are to be commended. We can appreciate also respondents' apparent desire to have their rates reflect to some degree high livestock prices. However, we do not believe it wise to prescribe at this time a tariff based upon a percentage of the selling price of livestock in the manner advocated by respondents. Respondents and the Branch agree that the basic objective of rates in a proceeding such as this is to return the costs of the service. The plan seems to assume that respondents' costs are lower when the sales prices are lower and that the costs are greater when the sales prices are higher. While it is true that there is some correlation between respondents' costs and the selling prices of livestock, as contended for by respondents, it is apparent that the correlation is in a broad sense over a long period of time. There are significant yearly fluctuations. A large corn crop may result in large numbers of hogs produced and a reduced price although the general price level and respondents' costs remain in *status quo* or even increase. For example, hog prices have come down considerably since the hearing but respondents' costs have probably gone up. Conversely, due to weather conditions or other

factors, a reduced supply of livestock may result in higher prices for livestock in advance of any increase in the general price level. Without additional study with a view to taking account of such factors, we are not convinced that the correlation has been shown to be sufficiently close to warrant a conclusion that the rates resulting from the percentage schedule would be reasonable. Again, it appears that for some time the percentage plan advocated would not be effective because livestock prices are at a level higher than the maximum flat charges proposed. This is another reason for not now prescribing the percentage feature since the plan would not go into operation until some indefinite future time. Perhaps the intervening period could be used for further research on the matter of a percentage plan or other formula which would be more closely correlated with respondents' costs. It might be observed too that the present proposal is somewhat complicated with the minimums, maximums and a percentage plan working between. Several computations would be necessary in many cases to determine the applicable charge. (Ibid., pp. 102-103)

The Judicial Officer also allowed a margin between per head revenues and per head costs stating:

> The rates prescribed are for a group of competing market agencies, not for a utility enjoying a natural monopoly. The results to the various agencies of charging the same rates will naturally vary. In order to make sure that the rates will not work a hardship upon reasonably efficient younger firms and others which for one reason or another are not yet firmly established, a per head margin above reasonable per head unit costs has been provided. An additional reason for allowing a margin between per head revenues and per head costs is in order to provide a cushion which can absorb a decline in volume of receipts and for other contingencies. If the volume should decline, most of the agencies would not be able immediately to reduce their costs in the same ratio. Their per head costs could not be held stationary but would increase and, but for the margins, the increase in per head costs would warrant the agencies in seeking an increase in rates. While rates are not prescribed in perpetuity, it is not desirable that they be changed with too great frequency. The inclusion of a margin makes it possible for the agencies to establish reserves against a decline in volume and other contingencies, and so makes for rate stability. (Ibid., p. 109)

E. *Fixing Rates for Livestock Auction Markets*

In 1942, the Secretary issued his first two decisions fixing rates for livestock auction markets.

a) In *Secretary of Agriculture* v. *Norfolk Horse and Mule Commission Sales Company*, 1 A.D. 372 (1942), several important policies were formulated and expressed. The activities of an auction market were found to be principally that of a market agency and the standards expressed in *Tagg Brothers and Moorhead et al.* v. *United States, supra,* were held applicable to livestock auction markets whereby the rates charged "should produce gross revenues sufficient to pay all reasonable costs and a reasonable compensation for management and risk, that is, a reasonable profit to the owner or owners of all firms which receive enough livestock to enable them to handle their business in a reasonably efficient and economic manner." The decision, however, perceived two important distinctions. Firstly, whereas each market agency at a

terminal stockyard must have uniform rates, an auction market's rates are treated as separate and distinct from those of its competitors; so much so that the decision refused to give consideration to the rates at various other auction markets within the same general locality stating that they were "not proper criteria in the determination of the reasonableness of respondent's rates" (at p. 377). The second distinction was in recognition of the market's capital investment as a stockyard wherein: "To the extent that the respondent has an investment represented by his stockyard, it is proper to include a fair return on the property used for stockyard purposes . . . Hence, the question is whether the income derived adequately compensates for the use of the property and the personal services rendered" (at p. 378). The decision then solved this problem by deducting from the market's established net income the sum resulting from a fair rate of return being applied to the original cost of property used by the stockyard less its accrued depreciation. The balance was considered to be in compensation for personal services as a market agency, and the sole remaining issue was whether this balance appeared to be adequate compensation for the personal services rendered.

b) *Secretary of Agriculture* v. *H. L. Bowman,* 1 A.D. 425 (1942) involved an auction market which primarily handled cattle consignments. The standards applied in setting the market's rates were identical to those in *Norfolk Horse* which included the substitution of a "business getting and maintaining" allowance in place of "trading losses" or "market support" activities, advertising expenses, interest, exchange and bank charges. The allowance amounted to one-tenth of gross commissions earned.

c) *In re Foust-Yarnell Stockyards,* 4 A.D. 826, decided in 1945, fixed rates for an auction market handling somewhat larger volumes of livestock than is handled by respondent Major Lewis. In the year 1944, it had received 60,431 cattle and calves; 55,995 hogs and 3,341 sheep or about 80,000 marketing units. The market's property was valued in the same manner in which the subsequent decision of *In re St. Paul Union Stockyards Co.* valued a terminal stockyard's property except that the reproduction new less depreciation method of structure valuation had not yet been replaced and was applied. The evidence introduced by P&SA to establish the property's worth was of the type customary to proceedings involving terminal stockyards and included the appraisal of its various units by appropriate experts. A fair rate of return was then determined and applied to plant, equipment and land and to the capital determined to be tied up, as required by respondent's particular business circumstances, in working capital (credit extended) and in feed inventory and pre-paid insurance. Having thus determined the fair return on the fair value of the market's capital investment, this amount was added to the annual operating expenses determined, based on P&SA audits, to be reasonable; to arrive at the market's reasonable revenue requirement. Again, 10% of gross revenues was determined to be the appropriate allowance for business getting and maintaining and replaced various itemized expenses such as donations, interest, feed sales on which no collection were made, bad debts, trading losses and taxes and insurance on not used and useful property. Additionally, certain expenses as shown by the market's books were found to be inadequate and those items were adjusted upward.

The reasonable revenue requirements were then compared with the revenues it had received under its existing schedule of charges which had been assessed:

. . . upon a percentage basis and provide a minimum charge per head on cattle and calves irrespective of value. It does not provide a maximum per head charge which respondent may assess. The schedule protects the respondent from charges which are extremely low on any animal, but it does not protect the user of respondent's services from the payment of extremely high rates on particular animals. The fact that the commission charges are a percentage of the value of the animals results in revenues which fluctuate greatly. When livestock is extremely cheap revenues are extremely low irrespective of the cost of doing business. When the prices of livestock are extremely high, the revenues of the respondent are correspondingly high irrespective of the cost of rendering the service. Greater stability is desirable. In addition to the commission charges, the respondent also makes certain yardage charges. Since it owns and operates the stockyard property and also conducts the auction market, its charges can be simplified by making one assessment for all the services it renders. For the reasons set out above, it is found that the rates now being charged by the respondent are unreasonable and that a schedule of reasonable rates should be prescribed.

The schedule of rates that was determined to be reasonable, fixed a flat per head charge covering all services rendered for cattle 400 lbs. and over, a flat per head charge approximately 40 percent lower for calves and cattle under 400 lbs., and flat per head charges approximately 70% lower for hogs and sheep. The methodology utilized to convert the reasonable revenue found to be required into these specific fixed per head charges was not explained, but it involved use of the unit method.

d) *In re Giles Lowery Stockyards*, 35 A.D. 267 (decided March 26, 1976) departs in many respects from previous ratemaking proceedings. It embodies concepts advanced in the dissertation (Ex. 72) submitted in 1975 to the University of Maryland by Everett O. Stoddard to fulfill his doctoral degree requirements. These concepts are also embodied in the testimony and the response of P&SA to the new tariffs respondents have instituted. Inasmuch as *In re Giles Lowery* is presently on appeal, findings on P&SA's present ratemaking concepts and approach are being made independently of the *Lowery* decision and further discussion of *Lowery* is reserved for "III. Respondents' Rates and Charges", *infra*.

II. *The Issues and the Scope of These Proceedings*

These proceedings are governed by 7 U.S.C. § 211, under which the threshold issue is whether any challenged rate or charge by a stockyard owner or market agency, is or will be unjust, unreasonable or discriminatory. If so found, just and reasonable rates and charges, both maximum and minimum, may then be determined and prescribed.

Testimony by administrative officials of the Packers and Stockyards Administration and the brief submitted in its behalf make it apparent that complainant seeks to accomplish much more through these proceedings. Complainant would have all value-based rates and charges declared to be inherently or *per se* discriminatory and unreasonable.

Furthermore, complainant would for the first time in contested proceedings, neither appraise land values, nor test by audit the accuracy of claimed items of expense and amounts requested by a market owner in compensation for his services and property; instead, complainant would

substitute and wholly rely upon a series of allowances constructed from national averages.

On the other hand, respondents would preliminarily question whether their tariffs may be regulated at all since as country auction markets, they fail to meet the requirements of natural monopolies. This question will be considered first.

A. *The Regulation of Country Auction Markets Under the Act*

Respondents contend that country auction markets cannot be regulated because they do not meet the requirements of natural monopolies which is a requisite for their regulation as public utilities. We agree that such markets are not natural monopolies. However, their regulation is not dependent upon that status. Regulation of these markets, as is the case with market agencies operating at terminal stockyards, is based on the "affected with a public interest" doctrine first enunciated by the Supreme Court in *Munn* v. *Illinois,* 94 U.S. 113, 126 (1877). It was on this basis that the Supreme Court in *Tagg Brothers & Moorhead* v. *United States,* 280 U.S. 420 (1929) held that the market agencies at the Omaha Stockyards were subject to Title III ratemaking under the Act. Respondents' arguments in many respects parallel arguments specifically addressed in that case by Justice Brandeis:

> The contention that Congress did not purport to empower the Secretary to issue an order prescribing the charges of market agencies is without substance. The language used was apt to confer the power. The committee of the House declared in terms that it did so, when it reported the bill. The executive department charged with the duty of enforcing the act so

> interpreted it. This court assumed in *Stafford* v. *Wallace,* . . . that the power has been conferred. (at p. 435)
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> • • •
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> The contention that the act, if construed as authorizing the order assailed, is void under the due process clause, is likewise unsound. It rests upon the fact that the services for which the Secretary's order fixed the charges are practically the personal services of brokers. Some of the market agencies are corporations; some, partnerships; some are individually owned. The capital needed in the conduct of their business is small. It is said that the business is wholly one of skill and labor . . .
>
> • • •
>
> This court did not hold in *Tyson & Bro.-United Theatre Ticket Offices* v. *Banton and Ribnik* v. *McBride* that charges for personal services cannot be regulated. The question upon which this court decided in those cases was whether the services there sought to be regulated were then affected with a public interest. Whether a business is of that class depends, not upon the amount of capital it employs, but upon the character of the service which those who are conducting it engage to render. (at pp. 438-439)

Respondent has argued that when enacted in 1921, the Act principally contemplated the regulation of terminal stockyards which had long enjoyed monopolistic positions. However, over the years country auction markets have replaced terminal stockyards in a number of important respects. Country auction markets perform the major assembly function for livestock from low volume farms and are the principal assembly point for calves purchased either as stocker feeder calves or as slaughter animals for veal (T. 269 and Ex. 72, tables 9 and 10, pp. 48-49).

Country auction markets are the principal outlets for small volume farms and most farms in low volume production areas (Ex. 72, pp. 50-54; Wootan, C.V. and McNeely, J.G., *Factors Affecting Auction Markets Operating Costs*, Texas A&M University, B-1056, Oct. 1966, p. 3; Hass, J.T., et al., *Marketing Slaughter Cows and Calves in the Northeast: Present System and Alternatives for Improvement*, Preliminary Report 14, FCS, USDA, p. 17).

Clearly, country auction markets are "affected with a public interest" and Congress acted within its constitutional powers when it amended the Act in 1958 subjecting such markets to all aspects of the Act including the rate-making requirements and procedures of Title III. That this was the intent of Congress is also clear:

* * *

Equally significant is the growth which has taken place in country buying—buying by packers or by livestock dealers direct from the producer, without the animals going through a public stockyard or market. There was little or no such buying at the time the Packers and Stockyards Act became law but it is today a common practice in almost every part of the country and more than 40 percent of all livestock sold moves in this manner. The Department of Agriculture has no jurisdiction over this country buying except that which is done by buyers for packers.

* * *

CHANGES MADE BY THIS BILL

From the foregoing it is obvious that the area in which the Packers and Stockyards Act is designed to operate has changed so substantially since 1921 that the Secretary of Agriculture is today charged by the act with responsibility over businesses and

operations which could never have been intended by the framers of the legislation and is, on the other hand, powerless to take any action in some matters which have become an important and vital part of the livestock and meat packing industry. The bill reported herewith is a committee bill, drafted by the committee following extensive hearings on this matter. It is designed to amend the Packers and Stockyards Act so as to make it once again an effective instrumentality for the regulation of the livestock and meat-packing industry and for the protection of both producers and consumers. Specific changes are made in the act to meet the problems outlined above. These changes are:

* * *

The Secretary of Agriculture is given jurisdiction over all livestock marketing involved in interstate commerce including country buying of livestock and auction markets, regardless of size. (House Report No. 1048, 85th Cong., 1st Sess., pp. 3-4)

B. *Discretion to Enter Per Se Findings*

Complainant's objection to value-based tariffs as inherently unreasonable and discriminatory is based on a long history of problems associated with their administration principally due to the difficulty of predicting the prospective revenues such tariffs will generate. *In re Foust-Yarnell Stock Yards*, 4 A.D. 826 (1945); and *In re Market Agencies at the Sioux City Stock Yards*, 9 A.D. 4, 61-62 (1950).

The scope of the administrative problems associated with value-based tariffs became magnified by the Act's amendment in 1958 and by a sharp and sudden drop in cattle prices in 1974. In 1958, the number of stockyards

posted under the Act, and thereby subject to P&SA jurisdiction, was increased by approximately 1,600 when the Act was amended to eliminate the exemption of all stockyards having less than 20,000 square feet of area available for handling livestock. Large stockyards usually employ tariffs with fixed per head charges, but smaller ones, such as those added by the amendments, more often than not have value-based tariffs. The one administrative advantage to value-based tariffs is the infrequency of requests to change them since they usually generate higher revenues than per head tariffs, but this is not the case when there are sudden drops in livestock prices as happened in 1974 (T. 42). In 1974, in light of the numerous requests by markets with value-based tariffs to increase their rates and charges, P&SA decided to disallow every request that would continue any form of value-based tariff (T. 69-70, T. 165). The requests by respondents were principally denied on that basis (T. 223) although their individual revenue requirements have also been analyzed by P&SA leading it to conclude that the new tariffs will generate revenues in excess of those requirements.

P&SA, in light of limited budget and manpower, has not elected to institute complaints against each of the nearly 1,000 stockyards presently utilizing value-based tariffs (T. 40, T. 153-154, T. 222). It has also elected not to attempt the abolition of value-based tariffs through rulemaking proceedings. Instead it urges that a finding be entered in these adjudicatory proceedings declaring value-based tariffs unreasonable and discriminatory *per se*. In suggesting this as appropriate procedure, complainant points out that the landmark *Morgan* cases, *Morgan II* in particular (*Morgan* v. *United States*, 304 U.S. 1 (1938)), actually involved Title III ratemaking under the Act, and therefore the Supreme Court's early proscription of an agency proceeding against an individual without a "full hearing" has particular application. However, in recent years, the Supreme Court has recognized that there are elements involved in ratemaking that might be better established through a broader, industry-wide approach. See e.g., *United States* v. *Florida East Coast R. Co.*, 41 U.S. 224, 242-244 (1973); and *Permian Area Rates Cases*, 390 U.S. 747 (1968). Complainant recognizes this development but asserts that the multi-year period needed to complete such proceedings does not commend it as the most expeditious resolution of general policy problems.

In this respect, complainant's concept of the ways in which general policy may be established, short of adjudicatory proceedings on a case-by-case individualized basis, is somewhat limited. Professor Robert W. Hamilton, who served as a consultant to the Administrative Conference of the United States, has written a most informative article appearing in 60 Calif. L. Rev. 1276 (1972), entitled *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*. In this article, Professor Hamilton points out that in addition to "informal rulemaking" by "notice-and-comment" under 5 U.S.C. § 553, agencies including the Department of Agriculture, engage in a wide variety of proceedings that have been designated as "formal rulemaking," "rulemaking on a record" or "legislation by adjudication" pursuant to 5 U.S.C. §§ 556 and 557. Such proceedings "are required by statute to be made on the record after opportunity for an agency hearing." but the "APA . . . does not impose the full panoply of adjudicatory procedures on such rulemaking" (Ibid., pp. 1276-1277). During the five year period ending in 1972, the Department of Agriculture held approximately 225 hearings of this type in the course of administering the Agricultural Mar-

keting Agreement Act of 1937, as amended, alone (Ibid., p. 1279). The procedures evolved by the Department under that statute (7 U.S.C. § 601, *et seq.*) have been lauded by Professor Hamilton for development of factual information, informing affected persons and allowing participation at a meaningful stage of the decisional process "which permit the handling of a large volume of rulemaking-on-a-record proceedings in a reasonably expeditious and efficient manner" (Ibid., p. 1302). For a variety of reasons that will become apparent, development of similar procedures may be a better response to the congressional mandate to extend ratemaking to small country auction markets than is provided by adjudication. In addition to Professor Hamilton's article, see G. Robinson, *The Making of Administrative Policy; Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485-539 (Feb. 1970); and the discussion of the various ways in which an agency may state policy short of adjudication in *Pacific Gas & Electric Co.* v. *Federal Power Com'n.*, 506 F. 2d 33 (D.C. Cir. 1974).

However, as complainant correctly points out, subsequent to *Morgan II*, all proceedings under Title III have been adjudicative. Accordingly, the Supreme Court's proscription of policy formulation on an *ad hoc* basis in *Morton* v. *Ruiz*, 415 U.S. 199, 230-238 (1974) is inapplicable in light of its pronouncement, two months later, in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974):

> The view expressed in Chenery II and Wyman-Gordon makes plain that the Board is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the Board's discretion.

See also *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947) (Chenery II); *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1968); *Bell Telephone Company of Pennsylvania* v. *FCC*, 503 F. 2d 1050, 1266 (1974); and *K. Davis, Administrative Law of the Seventies*, pp. 230-240. See also *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182 (1973) which upheld the Department of Agriculture's use of an adjudicatory proceeding to declare a departure from prior policies.

Having elected to establish the unreasonableness and the discriminatory effects of value-based tariffs through adjudicatory proceedings, the present resolution of that issue will be binding upon the respondents and will have precedent value in future Title III ratemaking proceedings involving others employing similar tariffs. But in such future adjudicatory proceedings, the various findings upon which our conclusions are based will be subject to new proofs and relitigation which could be largely foreclosed if these conclusions had instead been reached through substantive rulemaking. See *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *FPC* v. *Texaco, Inc.*, 377 U.S. 33 (1964); *National Petroleum Refiners Association* v. *F.T.C.*, 482 F. 2d 672 (1973) and *G. Robinson, op. cit.* Of course, the efficacy of rulemaking would be diminished if P&SA treated such rules, as it has others, as advisory only; see *Central Coast Meats, Inc., et al.* v. *United States Dept. of Agriculture*, F. 2d , No. 74-1302 (9th Cir., decided August 10, 1976).

In support of its request that value-based tariffs be declared *per se* unlawful, complainant has cited decisions construing various business relationships as *per se* violations of the Sherman Act, *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607 (1972); *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); and the cases collected in Van Cise, *The Future of Per Se in Antitrust Law*,

50 Va. L. Rev. 1165 (1974). However, the utilization of a value-based tariff does not appear to be so inherently "pernicious" and devoid "of any redeeming virtue" (*Topco*, at p. 607) as to require its inclusion within the business conduct listed by *Van Cise*:

> Generally recognized as per se illegal . . . are arrangements to fix prices, boycotts, divisions of markets, tying arrangements, and monopolistic conduct which is intended to foreclose competitors from a substantial market. Each of these practices has been ruled at one time or another to be amenable to condemnation without any extended analysis of the facts or exhaustive review of the law. (At p. 1167)

More to the point, whereas the courts may employ the concept of *per se* illegality to limit the issues to be fully adjudicated, the APA, the source of all federal agency power not expressly conferred by the statute being applied, permits in substitution of full adjudication—only rulemaking.

C. *Substitution of Allowances Based on National Averages for Individual Market Data*

Complainant, to better meet its responsibilities as overseer of the rates and charges of individual country markets, has devised a series of allowances to gauge the reasonableness of a number of elements for which claims of reimbursement, compensation, or return on investment have been shown by past proceedings to often be questionable and difficult to measure. These allowances address the problems associated with working owners who set their own salaries; markets which suffer bad debts at levels suggestive of managerial incompetence; markets which expend exorbitant sums on advertising and other promotional activities to attract business from competing

markets; markets which too readily and too often engage in so-called "market support activities" whereby large numbers of low quality animals are purchased by the market itself in the belief that bids received were too low, only to be later sold at the very prices rejected; markets which seek reimbursement for interest paid on borrowed money which they then assert is equity capital for which an additional, or double, return is sought; and markets which seek returns dependent upon determinations of land values which have in the past proven costly and time consuming.

There is no question then that the considerations which underly the allowances developed by P&SA are worthy ones; particularly so when viewed in light of Justice Frankfurter's exhortation in *Morgan* v. *United States* (*Morgan IV*), 313 U.S. 409, 415 1941):

> . . . since the Secretary is the guardian of the public interest in regulating a business of public concern it is not for him merely to reflect the items on a profit and loss statement. He must consider whether these represent services which properly should be charged to the public.

As indicia of whether P&SA should accept or challenge amounts a market claims for items known to be prone to abuse, the formula that have been developed are of invaluable assistance to its personnel. And, when combined with evidence derived from audit and expert appraisals of the market's property, as in *Giles Lowery*, may be of probative value.

The remarkable proximity, in the instant proceedings between the results obtained through the allowances to those obtained from the actual data submitted by the markets, has provided assurance that the revenue requirements

of three of the markets reflected in their 1974 reports were generally appropriate. As to the fourth, the data furnished by respondents proved through testimony elicited at the hearing to be uncertain and questionable and could not be accepted as sufficient for ratemaking purposes, regardless of how the claimed requirements compared with those P&SA has concluded typically apply at other markets.

The series of P&SA allowances may not serve as a total substitute for evidence of an individual stockyard's actual revenue requirements to the detriment of an affected party. For this reason, of the three respondents who reported and claimed revenue requirements that were found to be appropriate, the P&SA allowances were substituted only in the case of the one respondent who benefited from allowances higher than his reported requirements. The point being that these are adjudicatory proceedings, styled and patterned after previous ratemaking proceedings under the Act. Having elected to so proceed, complainant has encapsulated and restricted our focus to the revenue requirements applicable at each respondent's stockyard. This is not in variance with past proceedings, always the rates and charges at each stockyard have been reviewed in the sole context of the revenue requirements applicable at the stockyard itself. Never have allowances drawn from the experiences of other stockyards been utilized as evidentiary substitutes.

The methodology P&SA has recently developed for reviewing country auction market tariffs largely reflects national averages that applied in 1972. Superficially, the allowances resemble those approved and utilized to determine tariffs for market agencies operating at terminal stockyards, but their scope and purpose markedly differ. To achieve requisite uniformity of rates and charges at

a given terminal stockyard, allowances constructed from a representative number of the numerous market agencies operating at the given terminal stockyard have in prior proceedings been substituted for the expense data of the individual market agencies. However, there is no requirement that rates and charges applicable at various country auction markets be uniform; to the contrary, evidence of rates at other yards has been specifically held to not be proper criteria of the reasonableness of an auction market's rates. *Secretary of Agriculture* v. *Norfolk Horse and Mule Commission Sales Company,* 1 A.D. 372, 377 (1942). *Secretary of Agriculture* v. *H. L. Bowman,* 1 A.D. 425, 429 (1942) and *In re St. Paul Union Stockyards Co.,* 21 A.D. 1216, 1313 (1961). Therefore, although allowances based on national averages are helpful rules of thumb for the P&SA analyst in deciding whether there is a questionable item for which additional information is needed (T. 39), they are not equivalent to the allowances used as substitutes in ratemaking proceedings for terminal market agencies.

In the absence of evidence pertinent to the applicant stockyard of the type usually obtained by record audit and expert appraisals of property values, the data submitted by each respondent to the extent found credible and sufficient, must be assumed correct and accepted. To do otherwise would permit factual evidence to be replaced by supposition.

This is not to say that in the crucible of formal rulemaking proceedings conducted perhaps on an area basis as suggested in *Giles Lowery Stockyards,* 35 A.D. 267, at 289, these formula could not be formed as general rules, or even serve as the basis for proscriptive rates for multimarkets. But several apparent deficiencies in the formula would need to be overcome.

The allowances are based on data that is no longer current and their future reliability will obviously be dependent upon frequent updating.

The allowances which would replace salaries and other forms of compensation to market owners is premised upon salary data at markets being nationally equivalent irrespective of whether the owner renders such services in an urban or rural location; this premise does not appear sound. Nor is the assumption that there is an equivalence between the number of marketing units that salesmen for market agencies at a large terminal stockyard sold by private treaty almost 20 years ago and the number that an auctioneer will presently sell at a country market.

The allowance for land dedicated to a market by its owner disregards the dramatic differences in land values throughout the nation. Furthermore, even though the P&SA allowance for land employed by a stockyard undoubtedly saves both parties considerable expense whenever accepted by the stockyard, when contested, this allowance must fall since it does not square with binding precedent. The Supreme Court has stated in unequivocal terms that the constitutional proscription against confiscation of property applies to stockyard property:

> As of right safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates, not *per se* excessive and extortionate, sufficient to yield a reasonable rate of return upon the value of property used, at the time it is being used, to render the services. . . But it is not entitled to have included any property not used and useful for that purpose. *Denver Stockyard Co.* v. *U.S.*, 304 U.S. 470, 475 (1938).

In re St. Paul Union Stockyards Company, P&S Docket No. 1211, 21 A.D. 1216, 1235-1236 (1961), applied

the Supreme Court's mandate to stockyard land values and concluded that the present value of land, used and useful for rendering stockyard services must first be determined as if the land were:

> bare land, filled in, graded, and in its present condition insofar as topography is concerned but without improvements and merely available for various uses and purposes. The land must be appraised for its highest and best use. Consideration should be given to the element of plottage, but this factor must be weighed against the effect of the necessity for breaking up the areas to determine their values for alternative uses and purposes. Consideration of these factors may result in the conclusion that for stockyard use the values should be higher than for other uses or purposes. (Ibid., pp. 1235-1236)

Accordingly, in the event of contest, testimony must be forthcoming from experts qualified to appraise the value of a stockyard's land.

There are other difficulties observable in the allowances as presently formulated which complainant may wish to rectify in future proceedings, but the foregoing should suffice to indicate the general nature of the problems it must overcome.

Certainly, if rates for country auction markets were developed through formal rulemaking on the basis of regional area as suggested in *Lowery*, it is anticipated that the resulting rates would be based upon current, representative, data drawn from markets within the region, and this would cure many of the problems we have noted.

It would also better meet another problem that is ever-present in projecting future revenues for livestock

markets. The volume of livestock that an individual market will handle is less predictable than the average or representative volume that will be handled by a composite of the markets serving a given region.

To illustrate, it follows that inasmuch as cattle inventory remains at a fairly even level year-to-year, the volume of cattle that will be annually consigned for sale through auction markets in a given region will remain fairly constant. But the ability of an individual market to retain its share of cattle consignments is dependent upon managerial skill, customer satisfaction and many other intangibles subject to fluctuation. When construction of a tariff rate is based upon the volumes of livestock that efficient representative markets in the region customarily handle, the influence of these variables diminish as does the possibility that the level of revenues the rates are designed to achieve may soon be counterbalanced by substantial changes in livestock volumes due to the death of a working owner, advertising campaigns waged by competing markets, etc.

III. *Respondents' Rates and Charges*

It is concluded that the rates and charges of each respondent are unreasonable and discriminate against consignors of high value livestock, in contravention of the Act. This is due to the employment by respondents of value-based tariffs which impose charges as a percentage of sale proceeds without regard to the actual costs incurred by respondents in furnishing stockyard services. Prior proceedings in which the rates of auction markets have been reviewed make it clear that reasonable revenue requirements are in practice measured in terms of the market's actual costs and reasonable profit requirements rather than in terms of value conferred or the competitive environment. See, for example, *Secretary of Agriculture* v. *Norfolk Horse and Mule Commission Sales Company*, 1 A.D. 372, 377-378 (1942) and *Secretary of Agriculture* v. *H. L. Bowman*, 1 A.D. 425, 429-430 (1942). The value of the services rendered by a market to its patrons has been treated as an incidental consideration readily resolved. See, *In re Market Agencies at the Sioux City Stockyards*, 9 A.D. 4, 99-100 (1950).

It is further concluded that the just and reasonable rates and charges to be henceforth observed by respondents Central Arkansas Auction Sales, Inc.; Major Lewis d/b/a Major Lewis Livestock Auction Sales; and Travis McGee d/b/a Atkins Livestock Auction, are those set forth for each in findings 20-40, *supra*.

On the basis of the present record evidence, the just and reasonable rates and charges to be observed by respondents Bill Rice and Lois Rice d/b/a Cleburne County Livestock Auction Sale cannot be determined. The proceedings shall remain open for the purposes of taking further evidence and/or receiving stipulations by complainant and respondents Bill and Lois Rice, limited to the issue of their reasonable revenue requirements in furnishing stockyard services to their patrons. This would include development of an evidentiary basis, either by stipulation or the testimony of expert land appraisers and others, for ascertaining the present value of used and useful land employed by the market.

In reaching our conclusions we have not built upon those contained in *Giles Lowery Stockyards*, presently on appeal, but have strictly based them upon the record evidence before us in light of applicable law and policy expressed prior to the *Lowery* decision. That is not to say these conclusions are incompatible with those contained in *Lowery*; they are not. But the issues differ in such

material respects that to forge links between the policy considerations expressed in *Lowery* and the problems presently before us would have attenuated rather than augmented this decision.

The principal difference is that in *Lowery*, P&SA utilized formulated allowances in support of evidence obtained through audit and through the testimony of experts on property values. Therefore, the allowances were then considered wholly in terms of the probative weight they added to complainant's position, and not as has been urged here, as evidentiary substitutes. In addition, with the possible exception of respondents Bill and Lois Rice, the differences between revenue determinations based on the filed reports and on the P&SA series of allowances have been so insignificant as to make it clear that complainant's real goal is the establishment of simplified procedure for use as a matter of rote in future proceedings. In the context of proceedings such as these, this is an unobtainable goal. As was stated in 1962, *In re St. Paul Union Stockyards Co.*, 21 A.D. 1216, 1313:

> Under the circumstances, a comparison between the rates charged by respondent and those charged by other stockyards is of no value to us in this proceeding, nor would it be in any proceeding unless all operating conditions are shown to be almost identical, a situation which is extremely unlikely. It must be recognized that each stockyard, whether it is a terminal stockyard or an auction market, presents an individual problem with respect to rates.

The steps we have taken to determine each respondent's reasonable revenue requirements may appear simplistic compared to the complex series of allowances advanced by complainant, and the sophisticated formula urged in behalf of the respondents on brief. Our approach

has been solely predicated as it must be, on the evidence presented which does not lend itself to the theorems and postulates advanced. Once it was decided that 1974 was the approximate test year, being the most recent period of time for which full data was available at the hearing and which proved to be comparable to data for prior periods, the next task was to marshal all evidence demonstrating each market's revenue requirements that year in terms of reimbursable items of expenses, compensation for services performed and a reasonable return on property. Respondents furnished no data other than the 1974 annual reports; some of which they explained through testimony but nothing additional was provided. Complainant largely explained the allowances it used to analyze respondents' requirements, but did not present evidence obtained through audit, by appraisal of property, or otherwise.

Under these circumstances, we have necessarily assumed all data contained in respondents' reports for 1974 to be correct, except as to those individual items clearly not chargeable to rate payers under a general tariff. Under this test, however, the data furnished by Bill and Lois Rice appears so questionable that determination of their market's revenue requirements is presently precluded. As to two others, the resulting totals were only slightly higher than those urged by P&SA. The fourth, Major Lewis, received more under the P&SA analysis, and since it was to his benefit, the P&SA total was accepted.

Through this approach, claims for market support losses, advertising, and interest, were not, as in some prior decisions, expressly rejected, since it was concluded that in the context of the respondents' reports, the sums requested for these elements were found to approximate and provide respondents with reasonable and appropriate

compensation and reimbursement for other elements not specified in their reports but which are admitted to be proper and are the subject of complainant's proposed allowances.

To this was added a return, where applicable, on property at a 10 percent rate. This rate, suggested by complainant for buildings and equipment, was found to provide a reasonable return both on buildings and equipment and on the present value of land dedicated to a market's use. In determining that 10 percent was a reasonable rate, we were mindful that there are no legal restrictions on entry or exit of livestock auction markets; the capital investment needed is small, primarily involving the contribution of personal services; and the proliferation of such markets still tends to exceed the number considered by agricultural economists to be optimum. Ten percent has been determined to be the rate of return that will attract capital investment of land and property for the conduct of auction markets equivalent to the needs of rate payers. The fact that it exceeds the 8 percent so recently found reasonable in *Giles Lowery Stockyards* is attributable to continuing inflation recognized by complainant through its recommendation of the higher rate. The even larger rates suggested by respondents would attract greater capital investment than needed and are more appropriate to corporate business structures of the type which depend for capital upon publicly traded stock and bond issues.

The revenue requirements were not increased to provide reimbursement for income taxes paid. In the case of the markets owned by individuals or partnerships, these taxes are not paid by the markets but by the individual owners at the time the profits are passed on to them by salary or otherwise. The corporate respondent did not claim payment of income taxes; this is not unexpected,

since it is not a publicly owned corporation but the type of corporation principally formed to limit the liability of the working owners who thereafter normally draw out all profits in salaries and then pay income taxes at their personal rates which are normally lower than those applicable to corporations.

Nor was a specific allowance made for margin since the principal purposes served by inclusion of this element in the rate base is to avoid the future expense of applications seeking increases and to allow for the survival of those marginal market agencies whose profits suffer most under a uniform rate; considerations of diminished importance when, as here, individual country markets are involved instead of a large group of terminal marketing agencies requiring a uniform rate. Furthermore, the danger that the volumes of livestock each market is expected to handle will prove erroneous is so great in the case of small country markets that frequent review of their revenue requirements is mandated when an agency elects to fix such rates individually rather than on a regional basis.

In determining the rates and charges to be observed by respondents in the future, it has been concluded that a flat, per head charge for each animal handled best accords with the mandates of the Act. This conclusion is in part based on the fact that sales prices to be obtained by a market for its patrons in the future cannot be predicted with an acceptable degree of accuracy; whereas, livestock inventory can at least be forecast with some precision. But the principal basis is that value-based tariffs are not cost-oriented, and the established policy of the Department has been to treat a stockyard's revenue requirements in terms of its costs rather than the value of its services.

We were unable as complainant requested to further divide the per head charges into different integers for various bracketed weights of livestock consigned or for bulls or for livestock sold as pairs. The record evidence does not show that predictions of the number of animals that a given market will have consigned to it include accurate estimates of respective weights of the individual animals or how many will be bulls or will be offered as pairs, and may be as unreliable as predicates of future revenue as are value-based tariffs. Furthermore, the sales patterns upon which complainant constructed its proposed division of charges were based, not upon consignments to respondents' markets during the 1974 base period, but upon subsequent market samplings when consignments to the markets were materially different. By way of example projections of total annual consignments from the May 1975—March 1976 period would indicate Major Lewis handling 89,800 marketing units annually compared to 75,000 handled in 1974; Central Arkansas Auction Sales, Inc., handling 24,900 instead of 17,200; and Atkins Livestock Auction handling 23,842 instead of 17,400. A number of explanations come to mind, but the inference which cannot be overlooked is that the samplings were not representative.

For these reasons, the attached orders should be entered which in accordance with the Judicial Officer's recent decision *In re George Townsend, et al.*, P&S Docket No. 4858 (decided September 30, 1976) will be applicable to each respondent's successors and assigns and to that end the facility number of each respondent is included in accordance with complainant's request.

/s/ Victor W. Palmer
Victor W. Palmer
Administrative Law Judge

Dated: November 19, 1976

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Central Arkansas Auction Sales, Inc.	)	P. & S. Docket No. 5249
	)	
Respondent	)	

ORDER

It is ORDERED that, on and after 30 days from date of service of this order, respondent, Central Arkansas Auction Sales, Inc., Facility Number AR 131, its successors and assigns shall cease and desist from demanding or collecting for any stockyard service any rate different than those found to be just, reasonable and nondiscriminatory and as set forth below.

It is further ORDERED that, on and after 30 days from the date of service of this order, respondent, Central Arkansas Auction Sales, Inc., Facility Number AR 131, its successors and assigns, shall assess the schedule of rates and charges as set forth below, and shall not hereafter publish, demand, or collect any rate or charge for the furnishing of any stockyard service more or less than the rate or charge for the service set forth in such schedule:

A. *REGULAR SELLING YARDAGE CHARGES*

Cattle and Calves	$3.75 per head
Horses, Ponies, Mules	$7.50 per head
Hogs	$1.25 per head
Sheep and Goats	$ .94 per head

B. *RESALE AND NO-SALE CHARGES*

Definitions: (1) Resale charges shall apply on all livestock resold without leaving the market premises.

(2) No-sale charges shall apply when a consignor declares his consignment no-sale on price bid, bids in his consignment, or withdraws the same prior to actual sale.

Charges: One half (1/2) of the regular selling and yardage charges shall be assessed on all resales and no-sales.

C. *FEED*

The charge for all feed sold shall be the average monthly cost F.O.B. the market plus $0.005 per lb. or $0.50 per cwt.

D. *VETERINARY SERVICES*

The schedule of charges on all necessary veterinary services performed by an accredited veterinarian will be at posted uniform per head rates, pursuant to company agreement with the veterinarian performing such services and does not contain any charges retained by the market.

E. *SPECIAL SALES OR SERVICES*

Special sales or unusual stockyard services such as are included in featured registered cattle and calf sales, annual 4-H sales, and sales for one consignor sold on other than regular sale days which require special services and handling will

be charged for under special arrangements agreed to between the parties prior to the special sales.

It is further ordered that at least 10 days prior to the effective date of this order that the respondent shall publish, give notice of, and file with the Secretary of Agriculture, in accordance with the Packers and Stockyards Act, 1921, as amended, a schedule of the rates and charges as set forth above.

It is further ordered that the rates and charges found just, reasonable, and nondiscriminatory for respondent at its stockyard shall be the rates and charges to be assessed and collected at that posted stockyard by respondent or successor market agency, until modified or dismissed by an order of the Secretary.

It is further ordered that a copy of this order shall be served on respondent.

/s/ Victor W. Palmer
Victor W. Palmer
Administrative Law Judge

Dated: November 19, 1976

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Major Lewis d/b/a Major Lewis Livestock Auction Sales,	)	P. & S. Docket No. 5250
	)	
Respondent	)	

ORDER

It is ORDERED that, on and after 30 days from date of service of this order, respondent, Major Lewis d/b/a Major Lewis Livestock Auction Sales, Facility Number AR 146, his successors and assigns shall cease and desist from demanding or collecting for any stockyard service any rate different than those found to be just, reasonable, and nondiscriminatory and as set forth below.

It is further ORDERED that, on and after 30 days from the date of service of this order, respondent Major Lewis d/b/a Major Lewis Livestock Auction Sales, Facility Number AR 146, his successors and assigns, shall assess the schedule of rates and charges as set forth below, and shall not hereafter publish, demand, or collect any rate or charge for the furnishing of any stockyard service more or less than the rate or charge for the service set forth in such schedule:

A. *REGULAR SELLING YARDAGE CHARGES*

Cattle and Calves	$3.00 per head
Horses, Ponies, Mules	$6.00 per head
Hogs	$1.00 per head
Sheep and Goats	$ .75 per head

B. *RESALE AND NO-SALE CHARGES*

Definitions: (1) Resale charges shall apply on all livestock resold without leaving the market premises.

(2) No-sale charges shall apply when a consignor declares his consignment no-sale on price bid, bids in his consignment, or withdraws the same prior to actual sale.

Charges: One half (1/2) of the regular selling and yardage charges shall be assessed on all resales and no-sales.

C. *FEED*

The charge for all feed sold shall be the average monthly cost F.O.B. the market plus $0.005 per lb. or $0.50 per cwt.

D. *VETERINARY SERVICES*

The schedule of charges on all necessary veterinary services performed by an accredited veterinarian will be at posted uniform per head rates, pursuant to company agreement with the veterinarian performing such services and does not contain any charges retained by the market.

E. *SPECIAL SALES OR SERVICES*

Special sales or unusual stockyard services such as are included in featured registered cattle and calf sales, annual 4-H sales, and sales for one consignor sold on other than regular sale days which require special services and handling will

be charged for under special arrangements agreed to between the parties prior to the special sales.

It is further ordered that at least 10 days prior to the effective date of this order that the respondent shall publish, give notice of, and file with the Secretary of Agriculture, in accordance with the Packers and Stockyards Act, 1921, as amended, a schedule of the rates and charges as set forth above.

It is further ordered that the rates and charges found just, reasonable, and nondiscriminatory for respondent at its stockyard shall be the rates and charges to be assessed and collected at that posted stockyard by respondent or successor market agency, until modified or dismissed by an order of the Secretary.

It is further ordered that a copy of this order be served on respondent.

/s/ Victor W. Palmer
Victor W. Palmer
Administrative Law Judge

Dated: November 19, 1976

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Bill Rice and Lois Rice d/b/a	)	P. & S. Docket
Cleburne County Livestock	)	No. 5251
Auction Sale,	)	
	)	
Respondents	)	

ORDER

It is ORDERED that these proceedings shall remain open for the taking of additional evidence on the level of revenues reasonably required by respondents, Bill Rice and Lois Rice d/b/a Cleburne County Livestock Auction Sale, Facility Number AR 148.

/s/ Victor W. Palmer
Victor W. Palmer
Administrative Law Judge

Dated: November 19, 1976

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Travis McGee d/b/a Atkins Livestock Auction,	)	P. & S. Docket No. 5252
	)	
Respondent	)	

ORDER

It is ORDERED that, on and after 30 days from date of service of this order, respondent, Travis McGee d/b/a Atkins Livestock Auction, Facility Number AR 102, his successors and assigns shall cease and desist from demanding or collecting for any stockyard service any rate different than those found to be just, reasonable and nondiscriminatory as set forth below.

It is further ORDERED that, on and after 30 days from the date of service of this order, respondent, Travis McGee d/b/a Atkins Livestock Auction, Facility Number AR 102, his successors and assigns, shall assess the schedule of rates and charges as set forth below, and shall not hereafter publish, demand, or collect any rate or charge for the furnishing of any stockyard service more or less than the rate or charge for the service set forth in such schedule:

A. *REGULAR SELLING YARDAGE CHARGES*

Cattle and Calves	$3.90 per head
Horses, Ponies, Mules	$7.80 per head
Hogs	$1.30 per head
Sheep and Goats	$ .98 per head

B. *RESALE AND NO-SALE CHARGES*

Definitions: (1) Resale charges shall apply on all livestock resold without leaving the market premises.

(2) No-sale charges shall apply when a consignor declares his consignment no-sale on price bid, bids in his consignment, or withdraws the same prior to actual sale.

Charges: One half (1/2) of the regular selling and yardage charges shall be assessed on all resales and no-sales.

C. *FEED*

The charge for all feed sold shall be the average monthly cost F.O.B. the market plus $0.005 per lb. or $0.50 per cwt.

D. *VETERINARY SERVICES*

The schedule of charges on all necessary veterinary services performed by an accredited veterinarian will be at posted uniform per head rates, pursuant to company agreement with the veterinarian performing such services and does not contain any charges retained by the market.

E. *SPECIAL SALES OR SERVICES*

Special sales or unusual stockyard services such as are included in featured registered cattle and calf sales, annual 4-H sales, and sales for one consignor sold on other than regular sale days which require special services and handling will

be charged for under special arrangements agreed to between the parties prior to the special sales.

It is further ordered that at least 10 days prior to the effective date of this order that the respondent shall publish, give notice of, and file with the Secretary of Agriculture, in accordance with the Packers and Stockyards Act, 1921, as amended, a schedule of the rates and charges as set forth above.

It is further ordered that the rates and charges found just, reasonable, and nondiscriminatory for respondent at its stockyard shall be the rates and charges to be assessed and collected at that posted stockyard by respondent or successor market agency, until modified or dismissed by an order of the Secretary.

It is further ordered that a copy of this order be served on respondent.

/s/ Victor W. Palmer
Victor W. Palmer
Administrative Law Judge

Dated: November 19, 1976

APPENDIX D

PACKERS AND STOCKYARDS ACT, 1921

Title III—Stockyards

Sec. 301.[7] When used in this Act—

(*a*) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(*b*) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(*c*) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock on a commission basis or (2) furnishing stockyard services; and

(*d*) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser. (7 U.S.C. 201, P.L. 94-410.)

Sec. 302.[8] *(a)* When used in this title the term "stockyard" means any place, establishment, or facility commonly

7. Amended by acts of Congress, approved Sept. 2, 1958, and Sept. 13, 1976.

8. Amended by acts of Congress, approved Sept. 2, 1958, and July 31, 1968. Section 2(2) of Public Law 85-909 (Sept. 2, 1958) provided as follows: *"Provided, however,* That nothing herein shall be deemed a definition of the term 'public stockyards' as used in section 15(5) of the Interstate Commerce Act."

known as stockyards, conducted, operated, or managed for profit or nonprofit as a public market for livestock producers, feeders, market agencies, and buyers, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce.

(*b*) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition. (7 U.S.C. 202.)

Sec. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful. (7 U.S.C. 206.)

Sec. 306.[11] *(a)* Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard.

---

11. Amended by an act of Congress approved Sept. 13, 1976.

If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(*b*) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(*c*) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(*d*) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(*e*) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative

without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(*f*) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers

from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(*g*) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(*h*) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both. (7 U.S.C. 207, P.L. 94-410.)

9 CFR CHAPTER 2

§ 203.8 Statement with respect to regulations and practices of stockyard owners and market agencies.

(a) Stockyard services furnished by stockyard owners and market agencies pursuant to a reasonable request must be reasonable and nondiscriminatory. Stockyard owners and market agencies have the statutory right and duty to establish, observe, and enforce regulations and practices, which are not unreasonable or unjustly discriminatory, with respect to the furnishing of stockyard services.

(b) The Packers and Stockyards Administration encourages stockyard owners and market agencies to make

innovations and to establish and enforce regulations which foster efficient and competitive livestock markets. Section 201.4 of the regulations under the Packers and Stockyards Act (§ 201.4 of this chapter) emphasizes the importance of self-regulation by the livestock industry. It provides for the "legitimate application or enforcement of any valid bylaw rule or regulation, or requirement of any exchange, association, or other organization, or any other valid law, rule or regulation, or requirement to which any packer, stockyard owner, market agency dealer, or licensee shall be subject which is not inconsistent or in conflict with the act and these regulations."

(c) The livestock industry is in a constant state of transition. Rapid changes in the industry require a continual appraisal by stockyard owners and market agencies of their regulations, practices, facilities, and services to meet the demands of the changing industry and to insure improved, efficient services for market patrons.

(d) Livestock owners today have many alternative methods of buying and selling livestock which were not available at the time the Packers and Stockyards Act became law. Terminal livestock markets and auction markets compete with each other as well as other marketing channels, and stockyard owners and market agencies must continually seek ways to improve services and facilities offered to livestock owners. Subject to reasonable regulation the right to control and conduct the business of a public stockyard remains in the stockyard company, and the right to impose reasonable requirements on its members remains in the livestock exchanges. The Packers and Stockyards Act, 1921, does not abridge the right of the stockyard owner and livestock exchange to conduct their businesses and to establish and enforce regulations and practices not in conflict with the purposes of the law.

(e) Livestock market owners are not required to obtain a Federal certificate of public convenience and necessity before engaging in the business of operating a stockyard as a stockyard owner and conversely, they are not required to obtain Federal Government approval before they cease operations. The Packers and Stockyards Act does not prohibit a stockyard owner from changing the character of the market business. Nothing in the Act prohibits a stockyard owner from converting his operations from a terminal market to an alternative method of doing business. Nothing in the Act prohibits the stockyard owner from operating the new business alone or in association with other persons, including some or all of the market agencies previously engaged in business at the terminal stockyards.

(f) Market agencies at a terminal livestock market have invested time, resources, and effort in establishing their businesses at the market. As long as a terminal livestock market continues in business as a terminal market, the market agencies at the market cannot be removed arbitrarily or capriciously by the stockyard owner. There must be good and sufficient reasons for any such action. Similarly, the number of market agencies operating at the terminal market may be reduced only if such action is reasonably required to foster and insure an efficient, competitive livestock market.

(g) Whenever a stockyard owner engaged in operating a terminal livestock market elects to make a significant change affecting persons engaged in business at the stockyard, reasonable notice must be given to the public and to all persons engaged in business at the stockyard. The notice should be given as much in advance as possible before the date the stockyard owner proposes to effect any such change. Although there is no legal requirement

that stockyard owners consult with appropriate market representatives before deciding on rules or regulations affecting them, the Packers and Stockyards Administration encourages such consultation. (See Hearings before the Subcommittee on Livestock and Grains of the Committee on Agriculture, House of Representatives, 90th Cong., first session, on H.R. 6231, p. 23; and S. Rept. No. 1331, 90th Cong., second session, p. 2). Similarly, the market agencies and dealers should consult with stockyard owners on proposed rules or regulations affecting them or market services. In the event of a complaint, consideration will be given as to whether or not the views of the respective parties were fairly considered by the stockyard owners, market agencies, or dealers. The Packers and Stockyards Administration, wherever possible, will give recognition to the mutual agreements between market agencies or dealers and stockyard owners, provided that such agreements are consistent with the provisions of the Act.

(h) Stockyards no longer have a monopolistic position in the field of livestock marketing. Subject to review by the Secretary, a stockyard owner can deny a person the right to establish a business as a market agency or dealer at the stockyard for good cause. Registration with the Secretary as a market agency or dealer does not automatically require that the stockyard owner shall provide the registrant with facilities to do business on a market. To alleviate future misunderstandings about the privilege of establishing a business at a stockyard, a stockyard owner should publish rules to inform individuals and firms of the requirements for establishing a business at the stockyard.

(i) (1) The Act of July 31, 1968 (Public Law 90-446), added the following paragraph to section 307 of the Packers and Stockyards Act:

It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market. Such rules and regulations shall not prevent a registered market agency or dealer from rendering service on other markets or in occasional and incidental off-market transactions.

(2) Under this legislation, a stockyard owner cannot prohibit a market agency or dealer engaged in business at a stockyard from rendering service at another public stockyard. With respect to business by such a market agency or a dealer in an off-market transaction, i.e., a "country" transaction not at a public stockyard, a complete prohibition would be unlawful. The Act specifically states that a stockyard owner's rules and regulations shall not prevent a market agency or dealer from engaging in "occasional and incidental" off-market transactions. The term "occasional," as defined in dictionaries and as construed in numerous court decisions, means occurring now and then; occurring at irregular intervals; infrequent; according to no fixed or certain scheme. The term "incidental" means not of prime concern; subordinate; only an adjunct to something else; related, collateral or pertinent to; dependent on and following the existence of another and principal thing. It is not possible to establish an exact percentage or frequency test to determine whether a market agency or dealer is engaging in more than "occasional and incidental" off-market transactions. Each case would have to be considered on its own merits applying the commonly accepted meanings stated above.

(3) To limit off-market transactions which are more than "occasional and incidental," the stockyard owner would have to show that such limitation is necessary to foster, preserve, or insure an efficient, competitive public market. In reviewing such a matter on a case by case basis, the Packers and Stockyards Administration would consider all of the relevant facts and circumstances, such as the number of firms operating at the stockyard; the volume of market and off-market transactions being engaged in by such firms; whether the firms engaging in off-market transactions were deliberately trying to circumvent and weaken the public market; the extent to which such off-market transactions were injuring the market; the marketing alternatives available in the area; the competing elements of the livestock industry in the area; the quantity, type, and nature of the livestock business conducted in the area; and any other economic or statistical evidence relating to the matter. No one factor would be decisive. All relevant circumstances would be considered in order to determine whether the limitation was necessary to foster, preserve, or insure an efficient, competitive public market.

(j) The Packers and Stockyards Administration has the responsibility of giving consideration to the issuance of a complaint whenever it has reason to believe that any stockyard owner or market agency has violated the Act. In the formal administrative proceeding initiated by any such complaint, it is the responsibility of the Judicial Officer of the Department to determine, after full hearing, whether the stockyard owner or market agency has violated the Act.

(k) The Packers and Stockyards Administration does not favor or endorse any one system of livestock marketing over any other system of marketing. The views set

forth in this statement regarding converting from one system to another are solely for the purpose of setting forth our interpretation of the applicable legal provisions inasmuch as questions have arisen with respect to these matters. This statement is for the purpose of setting forth the views of the Packers and Stockyards Administration to guide those persons engaged in business as market agencies or as stockyard owners in establishing, observing, and enforcing regulations and practices in the control and conduct or their business. (Secs. 407, 4, 42 Stat. 169, 72 Stat. 1750; 7 U.S.C. 228(a). Interprets or applies secs. 304, 307, 312; 42 Stat. 161 et seq., as amended; 7 U.S.C. 205, 208, 213) [30 F.R. 15320, Dec. 11, 1965, as amended at 32 F.R. 7700, May 26, 1967; 35 F.R. 1048, Jan. 27, 1970]

ADMINISTRATIVE PROCEDURE ACT

552. Publication of information, rules, opinions, orders, and public records.—(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a function of the United States requiring secrecy in the public interest; or

(2) a matter relating solely to the internal management of an agency.

(b) Each agency shall separately state and currently publish in the Federal Register—

(1) descriptions of its central and field organizations, including delegations of final authority by the agency, and the established places at which, and methods whereby, the public may obtain information or make submittals or requests;

(2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of the formal or informal procedures available and forms and instructions as to the scope and contents of all papers, reports, or examinations; and

(3) substantive rules adopted as authorized by law and statements of general policy or interpretations adopted by the agency for public guidance, except rules addressed to and served on named persons in accordance with law.

A person may not be required to resort to organization or procedure not so published.

(c) Each agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(d) Except as otherwise required by statute, matters of official record shall be made available, in accordance with published rule to persons properly and directly concerned, except information held confidential for good cause found. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 383.)

Prior law.—This section is based on Act June 11, 1946, c. 324, § 3, 60 Stat. 238 (§ 1002 of former Title 5).

553. Rule making.—(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.

When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 383.)

Prior law.—This section is based on Act June 11, 1946, c. 324, § 4, 60 Stat. 238 (§ 1003 of former Title 5).

No. 77-1364

In the Supreme Court of the United States

OCTOBER TERM, 1977

CENTRAL ARKANSAS AUCTION SALE, INC., ET AL.,
PETITIONERS

v.

DEPARTMENT OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners are operators of livestock marketing businesses that sell livestock at auction for a commission. Petitioners seek review of a decision by the Department of Agriculture (Pet. App. A13-A137) that new commission rates petitioners sought to institute were not "just, reasonable, and nondiscriminatory," as required by 7 U.S.C. 206. The Department approved alternative rate schedules that were

greater than petitioners' existing charges but less than the requested increases (see Pet. App. A2).[1] The court of appeals affirmed, holding that petitioners had adequate notice of the method of computation the Department employed to establish the reasonableness of proposed rates, that the ratemaking formula employed was permissible, and that the administrative order was supported by substantial evidence and assured petitioners a reasonable rate of return (570 F.2d 724; Pet. App. A1-A12).

Petitioners contend that the Department failed to publish and give adequate notice of the methods it used to calculate the rates petitioners would be permitted to charge (Pet. 8-19). This contention is apparently grounded on both the Administrative Procedure Act, 5 U.S.C. 553 (Pet. 18), and the Freedom of Information Act, 5 U.S.C. 552(a)(1)(D) (Pet. 15).[2] Similar arguments have been raised in *Giles*

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[1] 7 U.S.C. 211 provides that whenever, after full hearing, the Secretary of Agriculture determines that any rates or charges are unjust, unreasonable, or discriminatory, the Secretary may determine and prescribe a just and reasonable rate or charge.

[2] Prior to the administrative hearing in the instant case, petitioners were provided with copies of the *Giles Lowery* decision. As we explain in our memorandum in opposition in that case, the Department of Agriculture used the *Giles Lowery* decision to establish certain ratemaking policies for the auction market business. After petitioners were provided with the *Giles Lowery* decision, they were granted a three-week continuance before the administrative hearing was convened (Pet. App. A4-A5). Petitioners therefore err in contending that they lacked notice of the Department's substantive rules at the time the administrative hearing was convened.

Lowery Stockyards, Inc. v. *Department of Agriculture*, petition for a writ of certiorari pending, No. 77-1366. For the reasons stated in our response in No. 77-1366, it is respectfully submitted that the petition for a writ of certiorari should be denied.[3]

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

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[3] Counsel for petitioners also represent the petitioner in No. 77-1366, and they thus have received our memorandum in that case.

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In the Supreme Court of the United States

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Petitioners,

vs.

THE U. S. DEPARTMENT OF AGRICULTURE AND THE PACKERS AND STOCKYARDS—AMS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF THE PETITION

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TABLE OF CASES

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REPLY MEMORANDUM IN SUPPORT OF THE PETITION

The Packers and Stockyards—AMS and the United States Department of Agriculture state, at pages 3 and 4 of their Memorandum In Opposition (in No. 1366—*Giles Lowery Stockyards, Inc.* v. *U. S. Department of Agriculture*, a companion case to this):

> "Petitioner seeks to distinguish these cases on the ground that the Department had adopted and applied the ratemaking principles approved in the instant case as early as 1970 (Pet. 12-16). Thus, petitioner asserts,

the principles were not adopted in either rulemaking or adjudication. But although a number of the theories that the Department formally adopted (for the first time) in this case had been applied on an informal case-by-case basis in previous years, that does not make their formal adoption less appropriate or valid. They escaped authoritative announcement only because, until the present case, none had been challenged in a contested action. . . ."

"It must follow that the Department was not obliged to publish its ratemaking procedures prior to the decision of the judicial officer, and that the procedures used here did not violate the FOIA. Procedures cannot be published before they have been adopted; when procedures are adopted in adjudication, the agency's opinion always will be the first formal publication. . . ."

By way of reply to Respondents' Memorandum In Opposition in general, and to the above-quoted material, in particular, Petitioners' Central Arkansas Auction Sale, Inc., et al. make the following points:

1. When Agency witness Jack W. Brinckmeyer, Chief of the Rates, Services and Facilities Branch of the Packers and Stockyards—AMS, states, for example, with respect to the computed allowance for the use of land, A109, "We adopted that approximately (in 1968) . . .", the simple and specific question is: "Why wasn't it announced to those affected so that they could have a chance to govern their businesses accordingly?" While the Respondents try to divert the Court's attention with a characterization that the Agency's use of its rate analysis methodology was "informally . . . applied", the testimony of Mr. Brinckmeyer, quoted so often in both the Decision of the Judicial Officer and in the Initial Decision of the Administrative Law Judge is definitely that the Agency did in fact *adopt* and *apply* its rate analysis methodology to those regulated without providing the regulated marketing businesses the opportunity to operate in accordance with the Agency's adopted policy.

2. This Court stated in *N.L.R.B.* v. *Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974) at 293, 294 (1771):

> And in *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969), the Court upheld a Board order enforcing an election list requirement first promulgated in an earlier adjudicative proceeding in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966). The plurality opinion of Mr. Justice Fortas, joined by the Chief Justice, Mr. Justice Stewart, and Mr. Justice White, recognized that "adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies, which are applied and announced therein," and that such cases "generally provide a guide to action that the agency may be expected to take in future cases." *N.L.R.B.* v. *Wyman-Gordon Co., supra*, at 765-766, 89 S.Ct. at 1429.

A review of the three leading authorities, *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947); *N.L.R.B.* v. *Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969); and *N.L.R.B.* v. *Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974), on the choice of ad hoc litigation vs. rulemaking cannot be squared with the Agency having a key witness (Mr. Jack W. Brinckmeyer), mount the witness stand and under oath in a full hearing in April, 1976, begin to testify about policy (rate analysis

methodology) adopted as far back as 1968—eight (8) years previously; but never announced to those affected by such policy. And this was done again and again. Hence, the rate analysis methodology was not "applied and announced" in the administrative hearing below. Rather, it was adopted and applied by the Agency in years prior to the hearing below; but, without giving knowledge of its adoption, application, and interpretation to those regulated. This underscores the extreme importance of Question 1 to the field of administrative law.

3. In summary, as opposed to the concept of the Agency's rate analysis methodology being derived from an adjudicatory hearing, either in 1974 or 1976, the rate analysis and corresponding dates of implementation are outlined as follows:

A. Obtain Actual Expenses Of The Marketing Business.

B. Obtain Adjusted Expenses By Removing:

1. Expenses irrelevant to market's consignors of livestock.
2. Owners' compensation and salary.
3. Bad debt losses.
4. Business getting and maintaining expenses.

C. Add Allowances For:

* 1. Compensation for working owners (1970) (A101-A106);

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*Note: The "removals" of Part B are later replaced with "allowances" in Part C, and the marked allowances are based on a computation involving the animal unit concept, with 1969 being the earliest firm date referenced in either the Initial Decision and Order of the Administrative Law Judge, see Appendix "C" beginning at A138, and the Decision and Order of the Judicial Officer, Appendix "B", beginning at A13, see especially A163.

* 2. Owners' management (1970) (A101-A106);

* 3. Interest on working capital;

* 4. Business getting and maintaining expenses (A164);

5. Return on buildings and equipment (1969);

* 6. Use of land (1969) (A119-A120 & A166);

7. Bad debts (1968) (A109);

* 8. Operating margin (A128).

D. Obtain Reasonable Revenue Requirement (B+C).

E. Compare Actual Revenue Of The Marketing Business To The Reasonable Revenue Requirement.

4. These four Petitioners concluded their petition as follows:

> "Without notice of either the substantive policy or its interpretation, the Petitioners have been subject to 'secret law'."

At first blush, this may seem a bit dramatic, but consider please the following from the Initial Decision and Order of the Administrative Law Judge, Appendix "C", A210:

> ". . . In 1974, in light of numerous requests by markets with value-based tariffs to increase their rates and charges, P&SA *decided to disallow every request that would continue any form of value-based tariff* (T. 69-70, 165). *The requests by respondents were principally denied on that basis* (T. 223) although their individual revenue requirements have also been analyzed by P&SA leading it to conclude that the new tariffs will generate revenues in excess of those requirements." (Emphasis added.)

But there is no mention of that "decision by P&SA to disallow every request" being announced to those affected by such a decision. And, again, the Agency's rate analysis is in place and in use.

Hence, Petitioners pray that their Petition For A Writ Of Certiorari be granted.

Respectfully submitted,

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